TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 331

ROY JONES, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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ROY JONES, PETITIONER,

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[fol. A] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

No. 4901

UNITED STATES OF AMERICA,

v.

ROY JONES, JAMES McKINNEY, GRADY W. JONES.

INDICTMENT—Filed October 1, 1956

The Grand Jury Charges:

Count One.

On or about May 2, 1956, in the Gainesville Division of the Northern District of Georgia, Roy Jones, James McKinney and Grady W. Jones did unlawfully, willfully and knowingly have in possession and custody and under control, and did aid and abet each other and a person and persons to the Grand Jurors unknown to have in possession and custody and under control, a still and distilling apparatus for the production of spirituous liquors set up without having the same registered as required by law, in violation of Section 5601, Title 26, U.S.C.

Count Two.

And the Grand Jurors aforesaid do further charge that at the time and place aforesaid the defendants aforesaid did unlawfully, wilfully and knowingly make and ferment, and did aid and abet each other and a person and persons [fol. 2] to the Grand Jurors unknown to make and ferment, on premises other than a distillery duly authorized according to law, approximately 2,700 gallons of mash,

the exact quantity being to your Grand Jurors unknown, fit for distillation and production of distilled spirits, in violation of Section 5216, Title 26, U.S.C.

Count Three.

And the Grand Jurors aforesaid do further charge that at the time and place aforesaid the defendants aforesaid did unlawfully, wilfully and knowingly possess, and did aid and abet each other and a person and persons to the Grand Jurors unknown to possess certain distilled spirits, to wit: 413 gallons, the immediate containers thereof not having affixed thereto, in such manner as to be broken on opening said containers, stamps evidencing the tax or indicating compliance with the provisions of Chapter 51, United States Revenue Code of 1954, in violation of Section 5008, Title 26, U.S.C.

Count Four.

And the Grand Jurors aforesaid do further charge that at the time and place aforesaid, the defendants aforesaid did unlawfully, wilfully and knowingly work, and did aid and abet each other and a person and persons to the Grand Jurors unknown to work in a distillery for the production of spirituous liquors, upon which no sign bearing the words "Registered Distillery" was placed and kept, as required by law, in violation of Section 5681, Title 26, U.S.C.

[fol. 3] A True Bill.

At Gainesville, Ga.

Ralph B. Hosch, Foreman, James W. Dorsey, United States Attorney, John W. Stokes, Jr., Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

PLEA—Filed October 8, 1956

Clerk's Docket No. 4901

I, Roy Jones, defendant, having received a copy of the within Indictment and having waived arraignment, Plead not guilty thereto.

In Open Court this 8th day of Oct., 1956.

Roy Jones, Defendant, Wesley R. Asinof, Attorney for Defendant.

[File endorsement omitted]

[fol. 4] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, ROY JONES TO SUPPRESS EVIDENCE, ETC.—Filed October 8, 1956

Roy Jones hereby moves this Court to direct that certain property, to wit: One 6 horsepower boiler, electric fuel burner and about 15 barrels, be suppressed as evidence and ordered returned to him on the ground that on the premises of the residence of Roy Jones on #136 Highway in Dawsonville, Georgia, Route #3, said articles were unlawfully and illegally seized from said premises on May 2nd, 1955 by Federal Officer W. W. Langford and four others whose names are unknown.

Movant shows that said Federal Officers seized said property without lawful warrant or authority and without the consent of Movant.

Wesley R. Asinof, Attorney for Movant.

Personally appeared before the undersigned officer, Roy Jones, who being duly sworn deposes on oath and says that the foregoing facts are true to the best of his knowledge and belief.

Roy Jones, (X) (His mark).

Sworn to and subscribed before me, this the 8th day of September, 1956.

J. O. Ewing, Notary Public, Fulton County, Georgia.

Service omitted.

[fol. 5] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Commissioner's Docket No. 1

Case No. 153

UNITED STATES OF AMERICA,

v.

ROY JONES, R. F. D., Dawsonville, Ga.

SEARCH WARRANT—Filed May 9, 1956

To W. W. Langford, or Any U. S. Marshal or other authorized officer.

Affidavit having been made before me by W. W. Langford that he (has reason to believe) that (on the premises known as) Roy Jones, State Road No. 136 about 2½ miles NE from Dawsonville, Georgia in the Northern District of Georgia, there is now being concealed certain property, namely (here describe property) Unregistered distillery which are (here give alleged grounds for search and seizure) Unregistered distillery as there is a strong odor of Mash and a rubber and metal hose leading from said premises above described into a wooded area, same concealed by dirt and leaves and upon previous observation motors have been heard in premises and loud noises, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this

[fol. 6] warrant and making the search (in the daytime[1]) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 2 day of May, 1956.

C. Winfred Smith, U. S. Commissioner.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. W. LANGFORD—Filed May 9, 1956

Before, C. Winfred Smith, United States Commissioner, Gainesville, Ga. The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Roy Jones, R. F. D., Dawsonville, Georgia on the State Road No. 136 about 2½ miles N. E. of Dawsonville, Georgia in Dawson County, Georgia, in the Northern District of Georgia there is now being concealed certain property namely a Non-Registered Distillery which is [fol. 7] unregistered distillery as there has been strong odor of Mash and a rubber and metal hose leading from said premises above described into a wooded area, same concealed by dirt and leaves and upon previous observation motors have been heard in premises and loud noises, which is the facts this affidavit is based upon and the facts tending to establish the foregoing grounds for issuance of this Search Warrant.

W. W. Langford, Signature of Affiant, Criminal Investigator, Official Title.

Sworn to before me and subscribed in my presence this 2 May, 1956.

C. Winfred Smith, United States Commissioner.

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[1] The Federal Rules of Criminal Procedure provide:

"The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C.)

[fol. 8] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION

Number 4901, Criminal Action

THE UNITED STATES OF AMERICA,

v.

ROY JONES, JAMES McKINNEY, WILLIAM GRADY JONES.

TRANSCRIPT OF PROCEEDINGS ON MOTION TO SUPPRESS EVIDENCE

Before: Honorable William Boyd Sloan, Judge, October 8, 1956.

APPEARANCES:

For the Government: John W. Stokes, Jr., Assistant United States Attorney, Atlanta 3, Georgia.

For the Movant: Wesley R. Asinof, Attorney, Atlanta National Building, Atlanta 3, Georgia. Howard Overby, Attorney, Gainesville, Georgia.

The Court: All right, the motion of Roy Jones, Motion to Suppress.

(The above matter having come on for hearing before the Judge without a jury, witnesses were sworn, rule not invoked, and the following proceedings were had.)

• • • • • • •

[fol. 17] MR. FRANK JONES, having been sworn, testified as follows:

Direct examination.

By Mr. Asinof:

Q. State your full name, please, sir.
A. Frank Jones.
Q. Where do you live, Mr. Jones?
[fol. 18] A. I live up there above Dawsonville, close to New Bethel Church.
Q. Where is that with reference to the home of Roy Jones?
A. Well, that's about a quarter from where I live out to the house, a short walk.
Q. About a quarter of a mile?
A. Short walk.
Q. Are you related to Roy Jones?
A. Yes, he's my son.
Q. Your son. Did you have occasion on or about the 2nd day of May of this year of being in his home?
A. Yes, yes.
Q. Was that at night?
A. Yes.
Q. Were you present when Officer W. W. Langford and some other federal officers came to that home of your son?
A. Yes, sir.
Q. Who else was present in the house at the time?
A. Well, they wasn't nobody in there but one of my boys.
Q. In the house?
A. Yes.
Q. At the time the officers got there?
A. Yes.
Q. Which one of your boys was that?
A. Millard.
Q. Millard?
A. Yes.
Q. Now, where was Mrs. Roy Jones at the time?
A. She had gone to Dawsonville, her and her sister, to a little play, some kind of a play out there at school.

[fol. 19] Q. Where were you?

A. I was sitting in the house watching the television.

Q. Sitting in the house at the time the officers got there?

A. Yes watching the television.

Q. Now, then, where, at the time how did the officers gain entrance into that house?

Mr. Stokes: If Your Honor please pardon me for interrupting Mr. Asinof, but it may be possible that some of the jurors are here in the Courtroom, and I don't know whether it would not be proper to have, not have them here since this is a matter that may come before a jury at this term of Court.

The Court: All right, I will ask all the jurors please, if any of them are in the Courtroom, to please retire from the Courtroom.

By Mr. Asinof:

Q. Now, Mr. Jones, how did these officers gain entrance into this house?

A. Well, I was setting in there, and Roy's wife and her sister had been to that little play and come back, and just about the time they stopped their car I think the officers went up to the car. Well, she come on in the door in front, well, they crowded right on in behind her, two of them, or three, I wouldn't say which, but I'd say there was that many, two or three, and she told them not to come in unless they had a right, and they just kept ascrouging on. Well, she pushed them back. I was setting there in four [fol. 20] foot of it. I thought about going out, but I did not get up, and she kept them pushed back a little bit, and in, I guess, three minutes, something like that the best I guess, why Mr. Woody come up, and he said, "I'm the law", says, "This is Woody," that's the first she knowed it was the law.

Q. Now, was anything—

A. And she asked them, she said, "Read your warrant, show your warrant," or "Wait until Roy comes and you can come in," and they wouldn't do it.

Q. What did they say with reference to a warrant? What was their reply about a warrant?

A. Well, I didn't hear them say nothing about it. I think Mr. Woody said he didn't have nairn, but he could write one.

Q. Said he could write one?

A. I think so, I think he said that.

Q. She did ask for a warrant, though?

A. Absolutely, two or three different times.

Q. Now, then——

A. And then told them to wait until Roy come and then they could come in.

Q. Now, where were the children all this time?

A. They was coming in the house from out of the truck, scared, come in there scared, and Lois come in—that was her sister, she was scared to death—she come in, too.

Q. Now, how did these officers—what treatment did they, these officers, how did they treat——

A. Well, they just pushed—the best I could tell, just shoved her back out of the way, and she would, she would try to keep them out, tried to keep them pushed out.

Q. And they shoved her out of the way?

[fol. 21] A. They shoved her out of the way.

Q. What about the children, did they shove the children out of the way?

A. Well, I didn't see then—no, I didn't see them shoving no children, I didn't. They come in and, after the law went on in, back through the hall, why, Roy's wife come in and says, "They've skinned my feet all over."

Q. Now, what did they find after they came in the house? What was in there?

A. Well, I suppose they found a boiler back there.

Q. Distilling equipment?

A. Yes. I didn't go back there. They went right on back the hall.

Q. What room was this in? What room of the house?

A. Well, second room.

Q. Second room?

A. Yes, from where I was sitting.

Q. How many windows are there in that room?

A. Well, I wouldn't know; about two, I guess.

Q. Two? Were the shades down?

A. Well, I couldn't tell you.

Q. Do you know whether or not there was any way that that boiler could have been seen from the outside of the house?

A. I couldn't tell you.

Q. But you and your son, I believe you said, were there?

A. Yes, sir.

Mr. Asinof: He's with you.

[fol. 22] Cross examination.

By Mr. Stokes:

Q. How long had that still been in the house?

A. I couldn't tell you that.

Q. You live right across the street from the house, don't you?

A. Yes, sir, about a quarter, a short quarter, I guess.

Q. And this same night, just before the officers came in there, a short time before, a truck came from your yard into the, over to this house where the distillery was located, didn't it?

A. I did not see it.

Q. How long had you been in the house when this thing happened?

A. Well, I had been in there ever since dark.

Q. You say you don't know how long that still had been there?

A. No, sir.

Q. It wasn't just a boiler, was it?

A. I couldn't tell you that.

Q. Didn't they have the hose running from the spigot in the kitchen all the way up to the attic for water supply for it?

A. I couldn't tell you.

Q. Didn't they have a big electric blower and oil burner downstairs to run it?

A. I just couldn't tell you about that. I don't know anything about that.

Q. Isn't it true that just a short time before the officers came in there was some three or four hundred gallons of whiskey loaded from the back door of that house into a

truck, this very house you were sitting in?

[fol. 23] A. Not to my knowing. If there was air drap loaded there, I didn't know it, nor I didn't see it.

Q. How long had you been there, to your best judgment?

A. Well, I had got there a little 'fore dark, I guess, about dark.

Q. Well, in minutes and hours, about how long had you been there? Had you been—how long had you been there when the officers came?

A. Well, they come about nine o'clock.

Q. You had been there two or three hours?

A. Well, I had been there that long, from dark until about nine o'clock.

Q. Who else wa in the house?

A. My boy.

Q. What is his name?

A. Millard.

Q. And who else?

A. Well, that was all. Well, Grady, that was another boy, he was in there.

Q. How long was Grady there?

A. Well, I guess he was there all the time. He enerally (sic) eats his supper out there, and stayed around there.

Q. Grady got arrested outside, didn't he?

A. Yes.

Q. In fact, he just came from the house when he got arrested, hadn't he?

A. Well, this truck that stalled down there at the highway, just stalled down there and stayed there for ten minutes or longer, I could hear it, I was in the room, I didn't go out, and he went down there to help out, and then the law raided it while he was down there, had been spinning there ten minutes or longer. If it had got up there, why the law wouldn't have got no liquor.

[fol. 24] Q. That truck which was stalled there came from right in back of this house you were sitting in?

A. Well, did I didn't know it, and I didn't hear it, and I was in the house, looks like I would have heard it.

Q. How do you know the truck was stalled?

A. I heard it.

Q. But you didn't hear it when it was right up next to the door of the house?

A. No. No, sir. You take a truck stalled, trying to pull, and he backed up there, he stayed there for ten minutes.

Q. Where does Grady live, or where did he sleep, live at that time?

A. He lived with me.

Q. I see.

Mr. Stokes: No further questions.

Mr. Asinof: Come down.

(Whereupon the witness was excused from the stand.)

[fol. 32] Mr. Roy Jones, having been sworn, testified as follows:

Direct examination.

By Mr. Asinof:

Q. Is your name Roy Jones?

A. Yes, sir.

Q. You are the defendant in this case?

A. That's right.

Q. Mr. Jones, where do you live?

A. I live about four mile, or four and half from Dawsonville.

Q. Is that the same place that you were living on or about May 2 of this year?

A. That's right.

Q. You live there with your wife and children?

A. That's right.

Q. And you did at that time?

A. That's right.

Q. Now, sometime during the night of May 2, what time did you arrive home?

A. I believe that it was right around ten o'clock.

Q. About ten o'clock?

A. That's right, might have been just a few minutes 'til, or a few minutes after. I wouldn't be positive.

Q. Who was there at the time you arrived?

A. Well, Mr. Woody was, Mr. Blizzard, James Hollingsworth, and another one, I don't know just what his name was.

[fol. 33] Q. Are they federal officers?

A. They said they was, which I knowed Woody was. They said they was.

Q. You knew at least one of them was federal officer?

A. That's right.

Q. Of the Alcohol Tax Unit?

A. That's right.

Q. Now, when you got there, was your wife there?

A. Yes, sir.

Q. How about your children?

A. They was there.

Q. How about your father?

A. He was there.

Q. Anybody else?

A. Two brothers. James McKinney, he was there.

Q. Now, what articles or equipment were seized in that house that night by those officers?

A. Well, they cut a complete still.

Q. Where was that still located?

A. The boiler and the burner was downstairs.

Q. In the house?

A. In the house.

Q. Which room?

A. Well, as you go in—it was the second room, go right down the hall and the second room on the left—the boiler and the burner was in there——

Q. Now, could any of that equipment be seen from the outside of the house?

A. No, sir, absolutely not.

Q. Do you know whether or not any of these officers had a warrant to search the house?

A. They didn't show me one when I came in, and I asked Mr. Woody, I said, "Why didn't you get one, Mr. Woody?" I said, "I thought you had to have a search warrant." He [fol. 34] says, "No,", (sic) says, "We don't have to have one."

Q. Yes, sir. Now, then, was anyone under arrest at the time that you got there?

A. Yes, sir.

Q. Who was that?

A. Grady Jones, James McKinney.

Q. Grady Jones, that your brother?

A. That's right.

Q. And James McKinney?

A. Yes, sir.

Q. Do you know whether or not—you don't know whether they were in the house or not at the time of the arrest, do you?

A. No, sir. They said they wasn't.

Q. You mean the officers said they weren't?

A. No, the boys told me about them a-catching them.

Q. Now, describe to the Court just what equipment it was that was in that—that was seized?

A. Well, there was a boiler. Most everybody in here, I imagine, knows what one is, and an electric fuel burner, and those hogs, I believe there was six of them upstairs, and there was five four foot hogs, or vats, if you want to call them vats, upstairs, and there weren't any way that they could have seed any of it without going up there.

Q. I see. Now, then, did they seize that, or destroy it, or take it with them, or what?

A. They took part of it with them, and destroyed the rest.

Q. Destroyed it right there in the house, or take it outside?

A. They destroyed everything in the house rather than the beer, or the mash, whichever one you might want to [fol. 35] call it. They pumped a good deal of hit out and left the rest.

Q. What time of day was it when you left the house that day?

A. I left there around six o'clock.

Q. Was it light or dark at that time?

A. It was light.

Q. It was light?

A. It was before dark.

Q. Did you see any of those officers there at that time?

A. No, sir, I did not.

Q. Didn't notice any signs of them being there at that time?

A. No, sir.

Mr. Asinof: He's with you.

Cross examination.

By Mr. Stokes:

Q. Do you claim that was your distillery?

A. It was.

Q. How long had it been there?

A. I guess it had been there a week or a little better.

Q. Now, then, the hogsheads were up on the second floor?

A. They was upstairs.

Q. And they were all full of mash, weren't they?

A. That's right.

Q. When the officers came in there. Some of it spent mash, and some fermenting mash?

A. It was all mash.

[fol. 36] Q. Yes. How did they pump any of the mash out? What was the arrangement for that? Where did it go when you pulled it out?

A. It went down the branch.

Q. Now, was there a hose or pipe?

A. There was a hose.

Q. How far away did it go to the branch? About how far from the house?

A. I would say three hundred feet.

Q. Just three hundred feet?

A. I would say that, which it might have been a little further, or it might not have been that far.

Q. Now, then, before this night the officers came there, mash had been pumped through that hose, hadn't it?

A. There had been, yes, sir.

Q. Spent mash that had been cooked; in other words, after you finished cooking it. It wouldn't be pumped out until it had been used up?

A. That's right.

Q. Where was the boiler located, downstairs on the first floor?

A. That's right.

Q. It had an electric blower to—for the fuel oil to fire——

A. Yes, sir.

Q. And was there an electric switch, or some automatic switch that cut it on and off, or not?

A. It didn't have no automatic switch; it just had a switch.

Q. That made quite a lot of noise when it was running, didn't it?

A. No, sir, not the way it was rigged up.

Q. I see.

A. It was rigged up right.

[fol. 37] Q. Did you rig it up?

A. That's right.

Q. The whiskey that was in that truck that was caught there, did that come from that still?

A. No, sir.

Q. You know where it came from?

A. No, sir.

Q. Grady Jones your brother?

A. Yes, sir.

Q. He lives across the road from you, or did at that time?

A. Yes, sir.

Q. Is that right? How long before the officers came in there had the still been run? When was the last time?

A. The still hadn't been run in two days, for what it was run, I run myself.

Q. Two days before the officers came there?

A. That's right.

Q. How long after you ran it did you wait to pump the mash out? Right afterward, or the next day?

A. I didn't.—I didn't pump any mash out.

Q. It would flow out when you poured it in the pipe?

A. That's right, when I wanted it to do that, it would.

Q. And on the run you had made before these officers came there, when did you get rid of the mash? The same day or the day after you made the run?

A. The same day.

Mr. Stokes: No further questions.

[fol. 38] Mr. Asinof: That is all. Come down.

(Whereupon the witness was excused from the stand.)

Mr. Asinof: Movant rests, Your Honor.
The Court: Proceed for the Government.

Mr. H. L. Eidson, having been sworn, testified as follows:

Direct examination.

By Mr. Stokes:

Q. Mr. Eidson, did you take part in the investigation involving a search and seizure of a non-registered distillery at the residence of Mr. Roy Jones on May 2, 1956?
A. I did.
Q. Had you been to that house, or to the area around it previous to that day, or within the past few days previous to that date, let us say?
A. I had been to the area.
Q. All right. What date did you first go to that area?
A. April 30, '56.
Q. Where did you go with reference to this house, and what did you do and see on April 30?
A. Well, on April 30 I went with other investigators by car, and parked near a church just above the home of [fol. 39] Roy Jones, and I got out and walked to the rear of this residence, traveling from west to east, and on the east side of the house, in the hollow, I saw the mash, a mash run.
Q. How far was that from the house?
A. Well, when I first saw it, I saw it in a branch, it was running down.
Q. Saw the mash in a branch?
A. Spent mash, yes, sir.
Q. Spent mash?
A. Yes, sir.
Q. All right. And about how far was that that you first saw the mash? About how far was that point from the house?
A. I'd estimate about seventy-five yards, I guess.
Q. Did you follow that mash, or track it to see where it came from on that date or not?
A. I followed it a short distance up the hollow, until I

could see an embankment of a public road, and then turned and went back to the other officers.

Q. How far was this particular place where you saw the mash from the yard or curtilage of the defendant's house?

A. On that day?

Q. Yes, sir.

A. Well, I imagine I got within fifty yards, perhaps.

Q. Well, let me ask you whether or not there is a cleared place, or anything like that around his house, where there is any out buildings, or anything of that nature?

A. The yard itself?

Q. Yes. Was it within that, or was it outside of the yard and immediate curtilage?

A. The mash run?

[fol. 40] Q. Yes.

A. It was outside of the yard, in the hollow located to the east.

Q. All right.

By the Court:

Q. I understood you to say it was about fifty yards from the edge of the yard?

A. That is the point that I walked up the hollow, and I imagine, I didn't measure it, of course, I estimate about fifty yards from the, where the mash was to the top of the ridge where the clearing by the house was.

By Mr. Stokes:

Q. Did you make any other investigations that day, or go back at a later day?

A. Went back at a later day.

Q. All right. What date did you next go there after April 30?

A. Went back May 1.

Q. Was anyone with you on that date?

A. Yes, sir.

Q. Who was with you?

A. Investigators Langford, Evans, Blizzard, State Agent Hollingsworth.

Q. What happened? What did you do and see on the 1st?

A. Well, on that date we went to a point near the house of Roy Jones, but across the public road in a pasture, and Investigator Langford and I then went to the part where I had first seen the mash run, and went and saw where the mash was coming out of the pipe into this hollow. It was [fol. 41] running out of the hose. I went to the hollow where I first saw evidence of——

Q. Actually running out of the pipe at that time?

A. Yes, sir.

Q. Was that at the same place you had seen it before or not?

A. No, sir, I didn't go up that far on April 30.

Q. Where was that? What was it coming out of?

A. It was coming out of a hose.

Q. Where was that with reference to the defendant's house and yard?

A. I'd say from that point to the—with the clearing or the top of the ridge where his house was, the yard was, about seventy-five feet.

Q. Were there any other houses or—were there any other houses so located that the hose would have been closer to any other house? Were there any buildings in such a place that it made it difficult for you to see which house it was coming from?

A. No, sir. There are no other houses near there.

Q. All right.

By the Court:

Q. Could you tell where the hose was coming from?

A. I could tell it was coming down the ridge. Now, I didn't go to the top of that ridge.

Q. You could tell it was coming down the ridge from the direction of the house?

A. Yes. It was partially buried.

By Mr. Stokes:

Q. Were you able to see the public road from where you were standing at that time?

A. Oh, yes.

Q. Was this hose——

[fol. 42] A. The embankment of the public road, it was a fill there.

Q. The hose was leading in the direction of the Jones house or not?

A. It was from west to east, as I recall it.

Q. Did you do anything else on that date, which would be May 1?

A. Well, I went with, Investigator Langford and I then went back and joined the other officers, and we observed the, kept the residence under observation, oh, until the morning of May 2, and I, from that point I could hear sounds from the house, bumping sounds, and sounded likt (sic) a blower operating.

Q. That was on the morning of May 2?

A. No, that was on the night of May 1.

Q. Oh, excuse me.

A. And we kept it, we stayed until the morning of May 2.

Q. From what direction did the thumping sounds and noise of the blower come?

A. Well, it sounded like from the direction of the house of Jones.

Q. Did you then go back on the evening of May 2?

A. Yes, sir.

Q. What happened then?

A. Well, we arrived at the same point and kept the house under observation, and as I recall, about seven or shortly after seven o'clock of that evening, a truck—we heard a truck start up the road and come to the Jones house, and drove in the yard and around to the back, and we heard bumping sounds then, and we were just, as I recall it, commencing to move in nearer when we heard the truck start up, and we closed in, and when I got to the [fol. 43] truck the defendants McKinney and Jones were in custody of Investigator Blizzard.

Q. Where was the truck when you saw it?

A. It was in the driveway, just from the yard of Jones to the public road.

Q. Was it pointing toward the public road?

A. Yes, sir.

Q. Was there anything in it?

A. Yes, sir.

Q. What was in it?

A. It was, as I recall, sixty-eight cases of nontaxpaid whiskey.

Q. Did you then go to the house?

A. Yes, sir.

Q. Who went to the—who was the first officer to go in?

A. I don't know, I wasn't present.

Q. They were already in the house?

A. They were already there when I arrived.

Mr. Stokes: No further questions.

By the Court:

Q. What official position do you hold?

A. At present?

Q. Yes.

A. I am Administrative Officer with the Department of Agriculture, U. S.——

Q. What position did you hold at that time?

A. I was a Criminal Investigator with the Alcohol and Tobacco Tax.

Q. Were you about your official duties at this time that you have described here?

A. Yes, sir.

[fol. 44] Q. Now, you described hearing a sound of the blower. What are blowers used for, if they are used for anything, in connection with the production of whiskey?

A. Well, a blower is used for the fuel transmission to operate the boiler in this case, or in cases of other stills they are used for the same purpose.

Q. Is it commonly used in connection with the operation of illicit distilleries?

A. Quite common usage.

Q. Are they used for any other purpose generally, in homes, or buildings out in Dawson County, that you know of?

A. I don't know of any, sir.

The Court: All right.

Cross examination.

By Mr. Asinof:

Q. Mr. Eidson, you say that the first occasion you had to inspect around these premises of that dwelling house was about April 30 of this year, is that correct?

A. April 30 this year.

Q. Was that in the daytime or at night?

A. That, as I recall, was in the daytime.

Q. In the daytime?

A. Yes.

Q. About what time?

A. I don't recall the exact time. I do recall it was shortly after lunch of that day.

Q. Was there anyone else with you at the time?

A. When I actually went to the area?

Q. I am speaking about—that's right, on the 30th day of April.

[fol. 45] A. As I said, I was with other officers, and by car we drove to a church located—to New Bethel Church, located above the Jones residence, and I got out of the car and went alone that time.

Q. What was the purpose of going there at that time?

A. Well, we had received information that Jones had had a distillery in his house, and operated a distillery before this, and that he had put another one in, and we thought we had better check.

Q. Now, that was the purpose of going there that day?

A. Yes, sir.

Q. Relying on the information that you had?

A. Yes, sir.

Q. Now, from whom did you receive this information as to——

Mr. Stokes: I will have to object to that unless—I don't know but I assume that it was a confidential source. I think I would like to ask——

Mr. Asinof: May it please Your Honor——

Mr. Stokes: —the record to show if it is.

Mr. Asinof: I think that certainly in a case of this type, where the Government is relying upon probable cause for

a search—this is a direct, one of the direct elements of probable cause, as to whether or not the informer was correct, the source of the information, whether or not the [fol. 46] information was correct, the type that it was. If this was one of the elements of probable cause that the Government relies upon, of course it would be admissible to, on cross examination, going into the contents of it. Of course, I realize that in the trial of a case that the question of information is ordinarily hearsay, and it is also irrelevant and immaterial as to what actually took place, but in this case, since the Government relies upon probable cause, and they rely upon that as an element of probable cause, it is admissible. I cite Your Honor to a case that was recently——

The Court: It isn't a question of the admissibility; it is a question of matter of the public policy of requiring a federal officer to disclose the source of confidential information, and I believe that the Courts make no distinction between trial and investigation on probable cause with respect to requiring its answer. I agree that it would be admissible in evidence——

Mr. Asinof: Yes, sir.

The Court: —but I do not think that the public policy would be served by requiring an answer. I will not require the witness to answer the question.

Mr. Asinof: Yes, sir. Then, as I understand it, just for the sake of the record, Your Honor, may I inquire of the Court as to whether or not the Court would consider the source, or consider the fact of this witness' information, of [fol. 47] confidential information as one of the elements of probable cause?

The Court: I will consider that it has not been established that the source of information was so reliable as to authorize the officers to rely upon the information.

Mr. Asinof: That was the only reason I made that——

The Court: They have the choice about that. If they do not wish to establish the source of their information, there would be nothing that would authorize the Court to find that it was such information as they would be authorized to act on.

Mr. Asinof: All right.

By Mr. Asinof:

Q. Now, Mr. Officer, that was on the 30th day of April that you went there, and I believe you said you saw some spent mash in the stream, is that right?

A. And on the ground, yes, sir.

Q. And on the ground?

A. Yes, sir.

Q. And I believe you said that was about how far from the curtilage of this dwelling?

A. Well, now, that was just an estimate, of course, I didn't measure it.

Q. Well, from your best estimate.

[fol. 48] A. From my estimate I would say about, well, now, the first point coming down the ridge, and when I hit the stream and the mash run for the first point, I'd say about seventy-five yards.

Q. About seventy-five yards?

A. That is an estimate.

Q. I see. All right. Then you say you came back the next day?

A. That's right.

Q. On the 1st day of May?

A. 1st day of May.

Q. And you again saw some signs of spent mash coming out in the same, about the same location, or where was that location?

A. Well, on April 30 I came in from the west, and circled the house and went, came in on the east side of the house, and went up a hollow. Now, on May 1, I came in from the south side, crossed the public road and came down to the, more or less head of the hollow.

Q. Now, isn't there a barn around there?

A. Yes, sir. As I recall there is a barn located, I believe to the rear.

Q. To the rear of the dwelling?

A. Slightly to the rear of the house.

Q. Where would that have been with reference to the spot where you first located this spent mash?

A. The barn, as I recall, was, is located more or less north of the residence, and where I was was on the east side.

Q. Did you investigate the barn?
A. No, sir.
Q. You didn't go in there?
A. I didn't know, I didn't go in the barn.
[fol. 49] Q. Well, actually, then, you didn't know whether this distillery was in the barn, or in the house, did you?
A. Well, I went to the east side of the house into this hollow, and on that date I didn't know, no, sir.
Q. I see. That is on the first day of May, you didn't know.
A. On April 30, that's right.
Q. Now, then, after you noticed these signs of spent mash in the stream on the 30th day of April, and you also noticed some signs on the 1st day of May, what time of day was it on the 1st day of May that you noticed these signs?
A. I don't recall the exact time. It was in the daylight, and in the afternoon.
Q. So, then, it would have been approximately, close to thirty or thirty-six hours then, before you actually went in there and raided this distillery, wasn't it?
A. We didn't raid the distillery until May 2.
Q. That's what I mean, May 2, at night?
A. Yes, sir.
Q. About nine o'clock, wasn't it?
A. That is when we actually raided.
Q. I see. Was it about nine o'clock at night?
A. The best I recall, nine or nine fifteen, I'd say.
Q. Now, then, what steps did you take from the 30th day of April, the 1st day of May, what steps did you take, yourself, to secure a search warrant to search those premises?

Mr. Stokes: Now, I object to that on the ground that we don't contend there was a search warrant, and we don't think the question of whether or not the officers tried to [fol. 50] get one would be material since it is the reasonableness of the search which is under question.
The Court: Objection overruled.

By Mr. Asinof:

Q. Did you understand the question?
A. Yes, sir.

By the Court:

Q. Did you make any effort to get a search warrant?
A. On May 1?
Q. Yes, sir.
A. As I recall, not on May 1.

By Mr. Asinof:

Q. Made no effort to get one?
A. Now, as I recall on May 1, no.
Q. Did you make any effort on April 30 to get a search warrant to search these premises?
A. Not on April 30.
Q. Did you make any effort on May 2 to get a search warrant to search those premises?
A. Yes, sir.
Q. You did make an effort?
A. I didn't, but a fellow officer did.
Q. Well, now, what effort was made, if any?
A. Well, a search warrant was obtained, a daylight search warrant.
Q. A daylight search warrant was obtained?
A. Yes, sir.
Q. From whom was this daylight search warrant obtained?
[fol. 51] A. Well, the U. S. Commissioner, located here in Gainesville.
Q. Now, that search warrant that you had——

Mr. Asinoff: Do you have it, Mr. Stokes?
Mr. Stokes: We don't have it. We understand the U. S. Commissioner has it, has a copy of it. Woody has a copy of it at this time.
Mr. Asinof: Do you have it, Mr. Clerk? Do you have a search warrant issued in this case?
The Clerk: I don't know. See what that is.— Is that it?
Mr. Asinof: That is it.

By Mr. Asinof:

Q. Is this the warrant that was secured?
A. As I stated, I didn't secure the search warrant.

Q. I see, but you did know there was a warrant issued to search the premises?

Mr. Asinof: If Your Honor please, could I have about three or four minutes to read this? I didn't know there was a warrant in this case.

[fol. 52] The Court: Yes, sir. We will suspend the trial of this case now, let the jurors in, and after the jury hours, we will resume the hearing.

Mr. Asinof: All right.

The Court: Go down. Let the jury come in. We will suspend here.

(Whereupon the witness was excused from the stand.)

(The hearing was resumed at 5:00 P. M. EST, and the following proceedings were had.)

The Court: All right, now, proceed with the cross examination.

Mr. H. L. Eidson resumes stand for continued cross examination.

By Mr. Asinof:

Q. What did you say your name was again, please?

A. Eidson, Hugh Eidson, H. L.

Q. Mr. Eidson, now you don't know whether or not any further evidence was, any further effort was made by any of the other officers or yourself toward securing a search warrant to search those premises at night, do you?

A. No, sir, not to my knowledge.

Q. To your knowledge is this warrant that I——

[fol. 53] Mr. Asinoff: Let me designate this, designate it as Movant's Exhibit #1.

The Clerk: Movant's Exhibit #1 for identification is a search warrant.

(Above search warrant marked for identification only as Movant's Exhibit #1.)

By Mr. Asinof:

Q. Is it your understanding, please, sir, that Movant's Exhibit #1, consisting of a search warrant in this case is the only warrant that was issued in this case or do you have any information as to any other warrant?

A. I actually don't have, I never saw the, examined the warrant.

Q. But you have no information as to any other war-warrant in the cast? (sic)

A. No, sir.

Mr. Asinof: That is all from this witness, if the Court please.

Mr. Stokes: No further questions from this witness.

The Court: You may go down.— Call your next witness.

(Whereupon the witness was excused from the stand.)

[fol. 54] Mr. H. E. Evans, having been sworn, testified as follows:

Direct examination.

By Mr. Stokes:

Q. Mr. Evans, did you take part in the investigation involving the search of the premises of Roy Jones?

A. Yes, sir.

Q. On the night of May 2, 1956?

A. Yes, sir.

Q. Had you been there before that date?

A. Yes, I had been there before.

Q. Well, when were you there before?

A. I was there on the 1st, 1st of May, and I was near there at this church, but I didn't go to his home on August 30.

Q. Did you make any observations on May 1?

By the Court:

Q. You mean April 30 or August 30?

A. April 30.

Mr. Stokes: I didn't notice it.

A. Beg pardon?

By Mr. Stokes:

Q. Did you make any observations on May 1?

A. On May 1, I was across the public road from the Jones home. I didn't cross over that road at all.

Q. Well, did you see anything?

[fol. 55] A. Yes. From the position where I was I could see—well, I remember one car came in there and stayed, oh, approximately thirty, forty-five minutes, could hear voices talking, and I could hear what I believed to be the blower cutting on and off every few minutes. It was, it would just run a little while, then it would cut off. You could smell mash, could smell hot mash. You could hear people moving around the house, and occasionally could see them.

Q. Now, where were you with reference to the house, then, you say across the road?

A. I was across the road.

By the Court:

Q. Could you tell that the odor of hot mash was coming from the house?

A. I could tell it was coming from that direction, sir.

Q. Could you tell that the noise of the blower was coming from the house?

A. Yes, sir.

By Mr. Stokes:

Q. Was that all the observations you made on the 1st?

A. Yes, sir, I believe that was about all I saw.

Q. On May 2, what observations did you make prior to the time you went in the house?

A. Well, we returned to the same place across the road, and I heard this truck start about, around seven o'clock, from up the road a ways, and come into the yard of Roy Jones' home, and went out of our sight around to the back. Again I heard, listened, I didn't hear any sound of

the blower that night, however, I did hear this bumping and [fol. 56] thumping noises of heavy objects being moved; and approximately nine fifteen I heard the truck start up over in this yard. It came out around in the front yard, where I could see it, and had the lights on; started up this grade up into the public road. At that time we were moving over nearer to the house. As the truck started up on to the public road, a car came down the road from the direction of Dawsonville, and turned into the yard of this house, and the driveway—there is an entrance at both ends, both sides of the house. As that car started coming down the road, the truck seemed to back off of this grade coming into the public road, and seemed to get stuck there. It was raining—very wet. This car that turned into the yard, did not turn off the lights. The lights stayed on. A light was turned on the front porch at Roy Jones' home, and I could see a woman on there and some children, also. All this time I was moving, coming across this road, this public road, and I also heard a woman's voice from the (sic) yelling something from this yard or the porch over there, as this truck started off again, coming up the grade on to the public road just as I got across the road, and I got into the truck and arrested James McKinney, who was driving this truck. As I came across the road, also, and across the ditch alongside the road, I saw another man on the truck standing up on the load. He disappeared from my sight as I went into the cab of the truck.

Q. Where had the truck come from? Could you see where it came from?

A. It came through the yard, came out from back of the house, Roy Jones' house, right through his yard.

Q. Did you then go to the house? Was that—excuse me a minute—did that truck have something on it?

[fol. 57] A. It had something over four hundred gallons of nontaxpaid liquor on it.

Q. Did you then go to the house?

A. Yes, sir, I did.

Q. Now, which door did you go to?

A. Well, I started to the front door, however, while I was in the cab of the truck with James McKinney, the other investigators, some of the other investigators came

and went past the truck. I got out of the truck and asked, I believe Investigator Blizzard to hold James McKinney, and I turned and ran toward the house. State Agent Hollingsworth was on the front porch at that time, and he yelled to me "He's going through the house with a gun," so I ran to the back door. At that time one of the other officers came around to the back, I am not sure who it was, and I left the back and went back to the front, went into the house there through the front door.

Q. Did you see Mrs. Jones?

A. I did.

Q. Where was she?

A. She was standing in the front door. As I came in, in the door, she was standing in the front door with her hands like this, spread from one side of the doorway to the other?

Q. Was there any of the officers in the house at that time?

A. I'm not sure whether Agent Hollingsworth was in the house at that time or not. He was right there either—I'm not sure whether he was on the porch or in the hallway.

Q. What did you do?

A. I went on in the house, into the hallway, went through into the second room on the left of the hallway, where the boiler was located.

[fol. 58] Q. Did you push or shove Mrs. Jones, or do anything like that?

A. I did not touch Mrs. Jones as I went in the house.

Q. Now then, you testified that on the 1st of May you had smelled the odor of cooking mash. Is it necessary in the operation of a distillery to cook the mash?

A. Yes, it is.

Q. And is that a necessary part of the production of liquor at a distillery?

A. It is.

Q. Is the—does it have a distinctive odor?

A. Very distinctive.

Q. You have had experience in identifying that odor with mash in the past?

A. Have smelled it many times at stills.

By the Court:

Q. Are you a federal A.T.U. Officer?
A. Yes, sir.
Q. What are your initials, Mr. Evans?
A. James H., sir.

By Mr. Stokes:

Q. Did you hear or see any cars on the night of May 1 go up toward the house, or near the house?
A. On May 1? Yes, sir, a car went into the yard and parked there.
Q. How long did it stay?
A. I think approximately half hour, or maybe forty-five minutes.
Q. Did you notice any connection between the time when you heard the sound of the blower, and the time when that car was there?
[fol. 59] A. Yes. The blower was not running while the car was there. The blower was running before the car came there, and was running after the car left, but it was not running while the car was there.
Q. Could you say what the woman shouted, that you said you heard shout? Could you understand what she said?
A. I believe it was something to this effect—— "Turn off the lights",—something to that effect. I was moving at the time, and am not absolutely certain of the exact words.

Mr. Stokes: No further questions.

Cross examination.

By Mr. Asinof:

Q. Mr. Evans, you said that you—where were you standing on the 1st day of May, 1956, when you observed these various acts?
A. Across the road, across the public road in front of his home.
Q. I see. Now, you were just standing there, or sitting in your car?

A. No, sir, I wasn't even near the car. I was on the ground.

Q. You were on the ground, just standing out in the open?

A. There's trees over there. It's a wooded area.

Q. You were concealed behind the trees?

A. Right, sir.

Q. Now, then, did you go with Mr. Langford when he secured this search warrant from the Commissioner?

[fol. 60] A. I don't believe I did, sir.

Q. Where were you at the time?

A. I don't recall, sir.

Q. Well, how long did you stay there on the 1st of May?

A. Well, went there before dark, and stayed until early morning of the 2nd.

Q. I see. So you were there all night observing the place?

A. Yes, sir.

Q. Did you go there on the 30th of April?

A. I went to a point near there. I didn't go to his house.

Q. Now, then, were you there all day on the 2nd?

A. All day? No, sir.

Q. What time did you arrive there?

A. Went back in the afternoon,—I don't recall what time, during the daylight hours.

Q. During daylight hours. Now, about what time did it get dark that day?

(sic) As I recall it was, it should be around, maybe six-thirty or seven. It was a cloudy, rainy day, so it was dark a little earlier than normal.

Q. And this was about what time that you searched the premises?

A. Approximately nine fifteen.

Q. So it was about, almost three hours after dark, or after sundown?

A. Yes, sir, something like that.

Q. Now, did you, yourself, attempt to secure any search warrant?

A. No, sir.

Q. To search the premises? Was there someone on duty

watching those premises all day? I mean, someone from the federal officers present?

[fol. 61] A. Not to my knowledge.

Q. Did you keep an around the clock watch, lookout on the place?

A. Not to my knowledge, sir.

Q. How many officers were present at the time that the search was made?

A. There were five, sir.

Q. Five. How many doors to these premises were there?

A. I'm not sure. I know there are two, a front and rear door. I don't know on the sides.

Q. You are not prepared to swear there are more than two doors?

A. No, sir, I'm not.

Q. Now, you had, in other words, a sufficient number of officers present to have placed a guard at the front door and the back door, the only two doors that you knew of, while another officer could have gone and secured a warrant to search the premises?

A. Yes, sir. We had five officers present.

Q. Yes, sir. What was the reason that you did not secure a nighttime search warrant?

A. The reason that I didn't?

Q. Yes, sir.

A. Well, I wasn't in charge of the operation, first of all. Another reason, I didn't believe it was necessary in that the crime was being committed in our presence, at least I assumed we had probable cause for that.

Q. What crime did you see committed inside the house before you went inside to search the place?

A. I didn't see any crime.

Q. What crime did you say was committed in your presence?

A. The one I saw was the transporting of the whiskey out through his yard.

[fol. 62] Q. Through his yard?

A. Yes, sir.

Q. You stopped that truck, didn't you?

A. Yes, sir.

Q. You arrested the occupants of that truck, did you not?

A. Yes, sir.

Q. Neither one of the occupants of that truck fled into that house, did they?

A. No, sir.

Q. So you had no knowledge that anyone else was even in the house, had you?

A. If you mean by "knowledge", did I see anyone else inside the house, no, sir.

Q. You had no direct knowledge of your own observation that a still was actually in the house, did you?

A. Of observation, no, sir.

Q. Only what you smelled?

A. And what I had been told. What I smelled and hear; and what I had been told by the other investigators that they had seen.

Q. Over a period of a couple of days?

A. Yes, sir.

Q. Now, it had been under surveillance for how many days? Do you remember, sir?

A. Under surveillance, I would say two days, the 1st and the 2nd.

Q. When was your first knowledge that this search warrant had been secured? When did you first learn it?

A. On the 2nd.

Q. What time of day?

A. It would have been before we left Gainesville to go out there.

[fol. 63] Q. And what time did you leave Gainesville to go?

A. I don't recall, sir.

Q. Approximately.

A. I'm not sure, but I believe it would be in the afternoon.

Q. In the afternoon. Can you give us—in other words, in the afternoon was when you left Gainesville?

A. Yes, sir. I believe that is correct.

Q. You don't remember—do you have any reports on it to refresh your memory, please, sir, and see if you can tell us when you arrived out there that day?

A. No, sir, I don't have it in any statement, as to what time we left Gainesville.

Q. It was daytime, though, wasn't it?

A. Yes, sir, it was in daylight.

Q. Daylight when you first got there, wasn't it?

A. Yes, sir.

Q. And you went there with Mr. Langford?

A. With Mr. Langford and other investigators.

Q. Was it your understanding that you had the warrant at that time?

A. Yes, sir.

Q. Why didn't you then search the premises under the warrant at that time?

A. My impression of the reason not to search at that time was to complete the investigation, and see what else would happen.

Q. Even though you were authorized to do so by a warrant?

A. Yes, sir.

Mr. Asinof: That is all.

[fol. 64] Mr. Stokes: Come down.

(Whereupon the witness was excused from the stand.)

Mr. G. G. Hollingsworth, being duly sworn, testified as follows:

Direct examination.

By Mr. Stokes:

Q. You Mr. George Hollingsworth?

A. Yes, sir.

Q. Are you a State Revenue Agent?

A. Yes, sir.

Q. For the State of Georgia?

A. Yes, sir.

Q. Mr. Hollingsworth, did you part, take part on May 2, with the federal officers, in this investigation involving the search of the premises of Roy Jones?

A. I did, sir.

Q. Were you present on any of the previous investigations at that place?

A. I was, sir, on May 1.

Q. What did you observe on that date?

A. On May 1, while accompanied by Investigators Langford, Eidson, Evans and Blizzard, I observed the residence of Roy Jones from a vantage point across the road, on a hillside looking down toward his home. You could see above the road, his home was in clear view, and at that time, from observation, I could smell the strong odor of mash, hot mash,—It was on May 1, and also hear the [fol. 65] blower go on and off. It worked more or less automatically, and at times it would go on, and at times it would go off. Ran very late into the night on May 1, while we were there.

Q. How late?

A. I would say it ran 'til two o'clock. I mean twelve midnight, and then 'til around two o'clock, two A. M., on May 2, sir, approximately.

Q. Did you, you were present also on May 2, in the evening, is that right?

A. I was, sir.

Q. Did you—would you just describe what you saw and did at that time?

A. We went back to the, to approximately the same place that we had been observing on May 1. Then around nine P. M., we saw this truck drive out through the yard, and I, with other officers, disappeared, went across the road. It was beginning to come up into the highway from the east driveway. There's two driveways, going in and out of his house. I went across the road, and as I came by the truck James McKinney was in the truck, and other officers disappeared around it, so I kept going toward the house, from the direction that the truck had came. I went on to the porch. Mr. Jones was at the porch, on the porch rather, and as I ran upon the porch a small boy there grabbed a shot gun and held it up more or less at port arms, and he went to the back. I hollered to Woody and Jim that he was coming to the back door with a gun, to look out. And after he went to the back door I told Mrs. Jones, I said, "Make the boy put the gun down," and she says, "I'm

not going to do it," asked for a search warrant, and I told her we didn't need a search warrant; and the kid came back toward me, and I kept telling him, "Son, don't [fol. 66] you shoot me, give me that gun," and he never would do it. I was standing in the door at that time, hadn't entered, so ever when the kid got close enough that I could get to the gun, I got to the gun, sir, got the gun from the kid.

Q. Did you push or shove anybody, Mrs. Jones or the child?

A. I don't recall, sir, if I did it was all unintentionally, I went for the gun at the time that I had a vantage point to get it.

Q. At the time you went out there, and at the time this had taken place, I will ask you whether or not, without going into contents of what they told you, had Mr. Langford and Eidson and other officers told you about the results of their prior investigations at this premises? I mean, right around this particular date?

A. Around——

Q. I mean, had they discussed with you—had you officers discussed with each other all of the things which you had found previous to this date?

A. Yes, sir.

Q. Around this house?

A. Yes, sir.

Mr. Stokes: No further questions.

Cross examination.

By Mr. Asinof:

Q. Mr. Hollingsworth, what time was it on the 2nd, May 2nd that you got out there to the Jones house?

A. It was around six thirty that we got to the point of observation, sir, I'd say six fifteen, six thirty, sir.

[fol. 67] Q. Were you with Mr. Langford at the time?

A. Yes, sir, approximately at that time.

Q. About five of you present at the time went out there together?

A. Yes, sir.

Q. Had you kept any surveillance on that house any period of time prior to that?

A. Yes, sir, on May 1, we had.

Q. How about on April 30?

A. I didn't join them on the investigation on——

Q. I see, it was your understanding there was a surveillance, though?

A. Yes, sir.

Q. Now, then, was anybody, was any officer, to your knowledge, left on those premises on the morning of the 2nd of May to observe what went on?

A. On the morning of the 2nd of May?

Q. Yes, sir.

A. No, sir. We departed, just, as I recall, around daylight, and went back out in a south direction from his home, from the point of observation. We got into the car and returned to Gainesville.

Q. In other words, you all went out there together, and you left from that place together, is that right? How many cars?

A. Yes, sir.

Q. How many cars did you use?

A. One car.

Q. Just one car. Now—Now, Mr. Hollingsworth, were you with Mr. Langford when he secured the search warrant?

A. No, sir, I was not, sir.

Q. Did you know he had one when you drove out there on the 2nd day of May?

[fol. 68] A. No, sir, I didn't. I hadn't seen the search warrant, sir. He picked me up at my residence, as I recall, as we left Gainesville, departed.

Q. Going out there didn't you discuss the fact that you had a search warrant?

A. Yes, sir, it was discussed, sir.

Q. So that—I mean, you had knowledge of it from your conversation with Mr. Langford?

A. Yes, sir, it was implications of it. I did not see it, sir.

Q. I mean, you didn't see the warrant, but he told you he had it?

A. Well, he didn't tell me he had one. It was just in

conversation through the other officers that I got into the car, at my residence, and we departed, and went on it, yes, sir.

Q. What time did you leave, do you remember?

A. It was about six o'clock, approximately.

Q. What time did you get there? You say about six thirty?

A. Six thirty, six forty-five.

Q. About an hour before dark, wasn't it?

A. Well, it was darkness came on a little early that afternoon.

Q. What time was sundown, do you remember?

A. Sundown was around seven, seven thirty,—May—close to eight o'clock, I'd say.

Q. In other words, the sun hadn't gone down when you got there?

A. I don't think so, but it was not visible due to the overcast.

Q. You had, you would consider it in the daytime, though, wouldn't you?

A. Yes, sir, it was in the daytime, but it was near the point of darkness.

[fol. 69] Q. Now, then, why did you go ahead and search the premises right then?

A. Well, we, afer (sic) we got there and the weather was bad, we observed at that point, I don't know why it wasn't served.

Q. In other words, you can't offer any explanation or reason?

A. No, sir. We observed, we were observing the house.

Q. I'm not talking about your observance, I'm talking about your authority to go in there and search?

A. No, sir. Investigator Langford was in charge of the investigation, sir.

Q. In other words, he determined, he ascertained, as far as you were concerned——

A. Yes, sir, I was only assisting——

Q. And he ascertained not to search the premises at that time?

A. Well, he was making all the decisions, sir. I was only assisting him.

Q. So then, it was good dark after you searched the premises, wasn't it?

A. Yes, sir, it was dark.

Q. It was nighttime, then, wasn't it?

A. Yes, sir, it was dark.

Mr. Asinof: Okeh, that's all.

Mr. Stokes: No further questions.

[fol. 74]

Mr. W. W. Langford, having been sworn, testified as follows:

Direct examination.

By Mr. Stokes:

Q. You Mr. W. W. Langford?

A. I am.

Q. Are you a Criminal Investigator with the Alcohol and Tobacco Tax Division, Treasury Department?

A. I am.

Q. Were you present at the time of the search of the premises of Roy Jones on May 2, 1956?

A. I was.

Q. Had you been there before that date?

A. I had.

Q. And were you with Mr. Eidson on April 30 and May 1?

A. I was.

Q. Would you just describe very briefly what you saw with respect to investigations around the premises, or the finding of any mash, or hose, and so forth?

[fol. 75] A. On April 30, I, along with Investigator Eidson and other officers, went to a point near the residence of Roy Jones, Dawson County, and at my request, Investigator Eidson circled through a wooded area near the premises of Roy Jones, and sometime later came back to me and informed me that he had discovered a flow of mash in a hollow on the east side of the residence of Roy Jones, and

I so advised him that we would leave at that time, and did. On May 1, during the late afternoon, I, with the other officers, went to a point near the residence of Roy Jones to observe the premises, and being on the opposite side of the public road from Roy Jones' residence; sometimes later Investigator Eidson and I went to this same hollow on the east side of Roy Jones' residence, and at that time I saw a flow of spent mash out into the hollow, and I asked Mr. Eidson to take a point and observe toward the residence, while I worked myself up the hillside going in the direction of Roy Jones' home, for the purpose of establishing the flow of that spent mash. At the time I discovered a rubber hose, some portions of it had been joined together by metal pipes, short pieces of pipe pieced together. At that time I saw the flow of spent mash coming out from this rubber hose. Some portions of it that had been busted open and come apart, there was spent mash there, and portions, the mouth from, the end of the rubber hose where I saw the spent mash flowing, that was concealed in a small trench covered over by leaves and dirt and all. This was in the wooded area near the public road, that leads in front of Roy Jones', and the hose was leading and up into the, toward the direction of Jones' home. I was some few yards from his yard at this time.

[fol. 76] Q. Was the hose underground, or above the ground?

A. Part of it was under ground and part had broken out, I guess the pressure on the hose or something, that it had come apart, and there was mash there, and as I said, where it had a direct connection up there is where the continuous flow of mash that I observed coming from.

Q. Is the, does spent mash have any different appearance, or odor from new mash, or from fermenting mash?

A. Well, yes, it does, but to describe it, that would be hard to do, but I could tell by observation, I can tell spent mash from fermenting mash.

Q. In the process of operating a distillery, is the spent mash the mash which has been distilled, and has had the liquor distilled out of it?

A. That is what we commonly call spent mash.

Q. Is here (sic) any way to achieve spent mash other than distill the liquor out of it?

A. None that I know of.

Q. All right. Then did you, is that all the observations you made on that day?

A. We, with Investigator Eidson, went back through the woods and cross the public road and joined the other officers who held position over there. At that time we kept the premises under observation during, on up until midnight of May 1, until approximately one or two o'clock on the morning of May 2, and during the course of that time I did hear a motor or fan, blower, cut off and on at intervals, and sometime during the night I saw a car coming from on the public road from in the direction of Dawsonville, Georgia, and enter into the front yard of the Jones residence, and heard talking, and stayed there some [fol. 77] thirty, forty-five minutes, possibly longer, but during the course of that time I didn't hear this motor or blower cut off and on at intervals, as I had previously heard prior to the arrival of that car, and after the departure of that vehicle I heard the motor or blower resume its operation, and also during the course of bting (sic) there and waiting, I could hear noises over there at the home of Roy Jones.

Q. What kind of noises?

A. Bumping noises.

Q. Was this later, at night?

A. It was.

Q. That you heard these noises?

A. Yes, sir. As I recall, we stayed there until midnight, until approximately one A. M. on the morning of May 2, and this noise of this motor blower cut off. Some few minutes later, after we were satisfied that activity had ceased at this time, why we departed and returned to Gainesville.

Q. Did you then return later that day?

A. On May 2, I, with these officers returned to this same area across the public road, in the late afternoon. It was an overcast, threatening rain, and held our positions there. Someone had left the home, got up the public road going from in the direction of Roy Jones' residence

toward his brother and father's home, who lives up the road towards Dawsonville on the opposite side of the public road, and I did hear some conversation in regard to "Do you want to bring the truck." Sometime later, some little bit later, I saw a vehicle drive into the yard, entering his west driveway going from the front door, front porch, and on around to the rear and out of my view, and it began to rain pretty heavy, and after the rain ceased more or less, why, I saw people moving about on the north-[fol. 78] east corner of the house, by a little post, coming through a window you could see persons moving about. Sometime a few minutes later, why I began to hear noises over there like moving about, heavy pieces of equipment or something, heavy noises over there. Sometime later, why I decided we should make some advancement toward the house, and about that time the motor cranked up and came from in the rear of the house out towards the public road on the driveway on the east side of his house, coming toward the public road, at which time it appeared that the truck became stuck. They were grinding the motor and making efforts to get out, and we made the initial move. I went to the rear, ran by the truck, went to the rear. Hearing some conversation up front, I did hear State Agent Hollingsworth call to me, "Look out, he's coming with a gun to the back", and then back up, as I was satisfied he had gone back toward the front of the house, I went around the front door, and as I recall, Investigator Evans, State Agent Hollingsworth was there, Mrs. Jones, some children, and I told her who I was, and she was standing in the front door, and she mentioned a search warrant. I told her I didn't need a search warrant, and I went down through the hall and into a rear room on the left side of the hall, and there I discovered an upright boiler, electric motor and blower attached, and there were several drums, fifty-five gallon metal drums sitting up right in this room, and then there was a stairway leading up the wall into the attic of the dwelling, and I went on up there, and I believe Investigator Eidson followed me, and we went up there and made observation about what was [fol. 79] upstairs, and I later came back down and seemed to be quite a bit of conversation, and I at that time, at this

time told Mrs. Jones that, to quieten the boy down, and kind of calm down some.

Q. Was there some other parts of the distillery upstairs?

A. The stills were up there, wood barrel stills, stills, wood barrels, and metal tank type fermenters. There was a part of a wooden barrel sawed in two, what I call a slop barrel. There's a mash pump up there.

Q. Excuse me, Mr. Langford, could you see into the truck as you went by it or not?

A. I did not, no, sir.

Q. On the date that you saw the hose coming from the dirtetion (sic) of Jones' house, with the mash coming through it, could you see any of the hose, or anything on his, in his yard, or could you see that? Did your observation of it carry that far?

A. My observation didn't carry that far. I had to keep myself concealed, but it was leading up the hill in the direction of his side yard, on the east side of his house, and in the position that I went up to check the flow of the spent mash, I could see that I was near the public road. I could see the bank of the public road.

Q. In the operation of a distillery, at which a blower is used, at what actual stage of the distilling process would the blower be used?

A. Well, it would vary. As I recall this particular still here would be working on a pressure guage, (sic) in other words, your steam pressure would vary the on and off of your motor to refuel it to generate more steam for the production of the liquor.

[fol. 80] Q. Well, I mean, is the heat or the burner and blower used at any time, at any other time other than when the liquor is actually being cooked out of the mash, or distilled out of it?

A. I wouldn't know any other time unless at such time perhaps they would use it in setting up a distillery to heat water to mix the commodities there to make mash. Other than that it would be used during the course of distillation.

Q. Did you obtain a search warrant earlier that day?

A. I had on May 2.

Q. And was that a warrant for a daytime search only?

A. That is correct.

Q. And was it daytime when you actually made the raid, or whatever you might call it?

A. It was nighttime.

Mr. Stokes: No further questions.

Mr. Asinof: I would like to designate this as Movant's Exhibit #2.

The Clerk: Movant's Exhibit #2 for identification, Affidavit for Search Warrant.

(Above marked for identification only as Movant's Exhibit #2.)

[fol. 81] Cross examination.

By Mr. Asinof:

Q. Mr. Langford, I show you what has been designated as Movant's Exhibit #1, being a search warrant. That the search warrant that you secured in this case?

A. This is what I believe to be the search warrant that I secured.

Q. I show you what has been designated the Movant's Exhibit #2, being an affidavit. Is that your signature on that exhibit?

A. Yes.

Q. Now, then, Mr. Langford, all of the testimony that you have given here today in this case relative to the facts upon which you believed that there was a distillery located in these premises, all of those facts were within your knowledge at the time that you appeared before the Commissioner to obtain the search warrant, were they not?

A. Would you repeat that, please? Would you repeat that question?

Q. Well, all of the facts upon which you have testified here today, that occurred up to the time that you appeared before the Commissioner to obtain this search warrant, you were in possession of all those facts at that time, and you submitted those to the Commissioner as the basis for which you obtained this warrant?

A. That is correct.

Q. Now, then, you arrived out there on the 2nd day

of May armed with this search warrant at approximately what time?

[fol. 82] A. It was late afternoon. It was an overcast day. It wasn't actually dark. It was, I guess you woulld (sic) say daytime, late afternoon.

Q. It was what would normally have been between the hours of sunrise and sunset, is that not correct?

A. I believe that is correct.

Q. Now, then, you waited from the time that you got out there, armed with this daytime search warrant, you waited until about nine fifteen at night, or until it was good dark before you actually made the raid?

A. That is correct.

Q. Now, you had with your (sic) four other officers, all of that time, did you not?

A. I did on May 1, and May 2.

Q. And May 2. Now, what is the reason that you did not search these premises in the daytime?

A. At that time, of my own opinion I hadn't completed my investigation.

Q. Well, now, didn't you swear before the Commissioner that you had reason to believe that on that property there was an unregistered distillery?

A. I had.

Q. Did you not swear at that time before the Commissioner, that there was a strong odor of mash, and a rubber and metal hose leading from said premises above described into a wooded area? Did you not swear to that?

A. I did, yes, sir.

Q. Did you not also swear to the Commissioner that you had previously, on previous observation motors have been heard, and loud noises?

A. Motors coming from the premises, yes, sir, noises.

[fol. 83] Q. Did you not swear that before the Commissioner?

A. I did.

Q. Now, then, you were in possession of all of those facts, and you went before the Commissioner on that date and secured the authority from the Commissioner to make this search?

A. I did.

Q. But yet you say the reason you did not make the search was because you still wanted to investigate further?

A. I wanted to see whether other parties would be involved.

Q. Would not the investigation have been complete if you had made this search in the daytime, and had found this distillery in the house? Would your investigation at that time not have been complete?

Mr. Stokes: I believe that is argumentive, (sic) if the Court please. It may not be, but I am objecting to it.

The Court: Well, it generally is argumentive, (sic) but I don't see any particular objection to it. He can answer it, I think the answer is prtty (sic) obvious. You know what happened after he got there.

Mr. Asinof: Yes, sir.

The Court: I think that it is really just about argument, but go ahead.

[fol. 84] Mr. Asinof: All right.

Q. Well, I mean, was there any other investigation that you wanted to secure other than the fact that there was a disillery (sic) in the premises?

A. I wanted to see whether other parties might become involved in connection with this alleged violation.

Q. Umm humm.

A. And also the possibility of any seized vehicles which might play a part.

Q. All right. Then you didn't wait until Mr. Jones, himself, came home, did you?

A. I did not.

Q. Yet they were his premises?

A. That is correct.

Q. Now, then, you had four other officers, and how many doors were there that led into this house?

A. Mr. Asinof, I do recall two doors and a possible third; I do recall two.

Q. You do recall two?

A. Two and a possible third door off the kitchen; I am not positive there, but I am as to the door at the rear and the front.

Q. Umm humm. In other words, you had a sufficien:

number of officers present—outside of yourself, you had a sufficient number of officers present by which you could have kept that house under surveillance at the time that you made the raid, and could have gone back and secured a search warrant to search the premises at night, did you not?

A. If I—do I follow you correct? After the seizure had been made?

[fol. 85] Q. No, before the seizure, did you not, at that time, have a sufficient number of officers by which you could have prevented anyone from coming or going, coming in or going out of those premises?

A. I don't know as I would have any right to have stopped anyone going in and out of those premises at that time, prior to the seizure of the distillery.

Q. Prior to the seizure?

A. Yes.

Q. You would not have had a right? You would not have had a right, you would not have been able to have arrested anyone coming out of those premises?

A. Had not I known there that they had violated some Internal Revenue Law.

Q. In other words, you didn't assume at that time that you even had probable cause?

A. I did assume.

Q. You did assume that?

A. Yes.

Q. And assuming that you do not think that you would have had the lawful right to arrest anyone coming out of those premises?

Mr. Stokes: I think that is getting into an argument of law.

A. I didn't say that.

Mr. Stokes: On that point he's talking about different kinds of probable cause.

[fol. 86] Mr. Asinof: I will withdraw the question.

By Mr. Asinof:

Q. Now, then, when you actually—I am speaking now of about the time that you say you saw this truck leave there, I am trying to establish this, please, sir, that you did have a sufficient number of men with you by which you could have still kept this place under observation, and could have gone back and gotten a warrant?

The Court: Mr. Asinof, there were five officers, and not over three doors.

Mr. Asinof: All right.

The Court: That answers the question.

Mr. Asinof: All right.

By Mr. Asinof:

Q. Now, then, you did not attempt to go back and get a warrant when Mrs. Jones refused you admittance, did you?

A. I did not.

Q. Mrs. Jones did ask you not to come in, did she not?

A. That is correct.

Q. Mrs. Jones asked you, did she or not ask you to wait until her husband got there?

A. I believe she did, yes.

[fol. 87] Mr. Asinof: All right, that is all.

Redirect examination.

By Mr. Stokes:

Q. How long after that did her husband come home?

A. I would say something like thirty minutes, possibly, could have been longer; about thirty minutes, the best I recall.

Q. He admitted the still was his at that time?

A. He did, talking to me on the front porch he told me it was his still.

Mr. Stokes: No further questions.

Mr. Asinof: Let me ask him——

Recross examination.

By Mr. Asinof:

Q. What was the reason, please, sir, that you told Mrs. Jones that you did not need a search warrant, or didn't have one?

A. Because I thought we had sufficient evidence to go in the premises without a search warrant.

Q. You didn't exhibit this search warrant that you had to her?

A. I did not, that was a daytime search warrant.

Q. All right.

[fol. 88] The Court: All right, you may go down.

Mr. Stokes: Come down. The Government rests.

(Whereupon the witness was excused from the stand.)

The Court: Anything further now for the movant?

OFFERS IN EVIDENCE

Mr. Asinof: May it please the Court, we would like to tender the affidavit and search warrant in this case.

The Court: Is there objection?

Mr. Stokes: Is this the affidavit you made out?

Mr. Asinof: He testified it was.

Mr. Stokes: We have no objection.

The Court: They are in evidence.

(Movant's Exhibits #1 and #2 received in evidence.)

[fol. 95]

* * * * * * *

IN UNITED STATES DISTRICT COURT

ORDER AND FINDINGS OF FACT OVERRULING MOTION TO SUPPRESS—October 11, 1956

Roy Jones has filed a motion in this Court to direct that certain property, to-wit: One 6 horsepower boiler, [fol. 96] electric fuel burner and about 15 barrels, be

suppressed as evidence and ordered returned to him on the ground that on the premises of the residence of Roy Jones on No. 136 Highway in Dawsonville, Georgia, Route 3, said articles were unlawfully and illegally seized from said premises on May 2, 1956, by federal officer W. W. Langford and four others whose names are unknown.

The matter came on for a hearing before the Court, evidence for both parties was heard; memoranda of authority submitted and after due consideration the Court makes the following:

Findings of Fact

On April 30, 1956, the federal investigators of the Alcohol & Tobacco Tax Unit of the Internal Revenue Department received information that Roy Jones was operating an illicit distillery in his home in Dawson County, Georgia. The Government refused to reveal the source of this information and the Court cannot determine that such source was reliable; however, the defendant, Roy Jones, had previously been found to be operating an illicit distillery in his home and the federal officers knew of this fact and they did credit the information and on that date made an investigation near the home of Roy Jones.

In a hollow to the rear of Roy Jones' house, the officers found spent mash flowing down a branch and upon investigation discovered that it was running from a concealed rubber hose which, upon being traced, led in the direction of the defendant, Roy Jones' home, tracing said hose to [fol. 97] within about 75 yards of his home. On the following day, the federal and state officers placed themselves across the public highway from Roy Jones' home, concealing themselves in a woods to where they had plain view of the defendant, Roy Jones' house and while there they heard the noise of a blower burner, this blower burner being of the type generally used in Dawson County, Georgia, to heat illicit distilleries, no other use for such a blower burner being known in said county. The officers also smelled the odor of hot mash coming from the direction of the house and they kept the house under surveillance until after 2:00 o'clock in the morning of May 2 and during this time they

heard much activity, the moving of heavy objects about, inside the house, with the blower burner operating as late as 2:00 o'clock A. M.

During the watch over Roy Jones' house, the officers observed a motor vehicle go into the yard of the residence and during the stay of the vehicle the blower burner did not run but after the vehicle left, the sound of the blower burner was again heard.

Shortly after 2:00 A. M., on May 2, 1956, the officers left their post of observation and returned to Gainesville and during the day of May 2, 1956, federal officer Woody W. Langford went before United States Commissioner in Gainesville, Georgia, and obtained a daylight search warrant to search the dwelling and premises of the defendant, Roy Jones; Langford at that time making affidavit before the United States Commissioner which stated in substance what the officers had discovered and asserted the belief that there was an illicit distillery in the home of Roy Jones. [fol. 98] Late in the afternoon the officers returned to their post of observation, near the home of Roy Jones, and desiring to seize any vehicles engaged in removing the illicit liquors they did not immediately execute the daylight search warrant but waited for some vehicle to arrive. Since no vehicle came to the dwelling until after dark, they did not execute the daylight search warrant but remained on watch until after dark and until about 9:00 o'clock P. M. About 9:00 P. M. some person left the residence of Roy Jones and went up the road toward the home of Frank Jones, the father of Roy Jones, and where Millard and Grady Jones, brothers of Roy Jones, lived and at that time the officers over heard a conversation when it was asked of some one in Roy Jones' house if they were ready for the truck to be brought to the house. A short time later, a truck left the yard of the home of Roy Jones' father nearby and drove into the yard of Roy Jones' house and around into the back where the officers heard a thumping sound as though there was activity with heavy objects and shortly thereafter the truck pulled out from the rear of Roy Jones' house and started to drive into the highway but it was rainy and wet and as the truck tried to pull up the incline from the yard into the highway it became stuck and at that point the officers made the initial

move to seize the truck and raid the home of Roy Jones. They arrested James McKinney and William Grady Jones, occupants of the truck, and seized 413 gallons of non-tax-paid liquor which was loaded on the truck. About that time a car drove up into the yard of Roy Jones' house and in the car was the wife of Roy Jones with his children, and Mrs. Lois Willis, the sister of Mrs. Roy Jones and her [fol. 99] children. Mrs. Roy Jones undertook to block the doorway to keep the officers from entering the dwelling house, telling the officers to wait until her husband, Roy Jones, returned. A twelve year old son of Roy Jones obtained a shotgun and while he did not point it at the officers, he held it at port arms in what the officers considered a threatening manner and the first entry into the residence was made by State Agent Hollingsworth to secure the shotgun and take it away from the child. Mrs. Jones asked officer Woody Langford if he had a search warrant and Langford replied that he did not need one and the officers then searched the premises without a search warrant.

The house had only two or three doors and there were five officers watching the residence and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary.

Upon a search of the premises, it was found that in a downstairs room of the house there was a complete distillery consisting in part of an upright boiler with a blower burner with which to heat it, and in the attic there was 2400 gallons of mash with hose pipes leading to the outside for the disposition of the spent mash. There were no signs posted showing it to be a registered distillery. It was fully setup and ready for operation and had been recently operated. A small quantity of non-tax-paid liquor was found in the residence also.

[fol. 100] The court finds that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed and therefore the Court finds that probable cause for the search existed at the time the search was made.

Conclusions of Law

Only reasonable searches are proscribed by the Fourth Amendment. There is no precise formula for determining reasonableness. Every case must turn on its own facts and circumstances.

If the officer has no warrant, he must show probable cause.

Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged. See Dumbra v. United States, 268 U. S. at page 441. The search here was not unreasonable and did not violate the Fourth Amendment because the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime search warrant. See United States v. Rabinowitz, 339 U. S. 56 at page 66 overruling Trupiano v. United States, 334 U. S. 699 to the extent that the Trupiano case required a search warrant solely upon the basis of practicability of procuring rather [fol. 101] than upon the unreasonableness of the search, stating that: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Judgment

The motion to suppress is overruled and denied.

This the 11 day of October, 1956.

Boyd Sloan, United States District Judge.

In United States District Court

Findings of Fact and Conclusions of Law—Filed October 12, 1956

The above stated case coming on to be tried by the Court, without a jury, and upon the stpiulation (sic) into

evidence at said trial of all the evidence introduced upon the hearing of the defendant's Motion to Suppress and the further stipulation into evidence of additional facts relating to the location and description of the distillery, mash and distilled spirits with which this case is concerned, the Court makes the following:

Findings of Fact

That, on or about May 2, 1956, in the Gainesville Division of the Northern District of Georgia, the defendant had possession, custody and control and aided and abetted his co-defendants, James McKinney, Grady W. Jones and [fol. 102] persons unknown to have possession, custody and control of a non-registered distillery set up. On said date the defendant fermented and aided and abetted the others named herein to ferment approximately 2700 gallons of mash fit for distillation at premises other than a registered distillery. At the same time and place he possessed, and aided and abetted the others named here to possess, 413 gallons of distilled spirits in containers which had no federal tax stamps on them. At the same time and place the defendant worked and aided and abetted the others named here to work at the aforesaid non-registered distillery, at which there was no sign posted bearing the words "Registered Distillery".

On the basis of these findings the Court makes the following:

Conclusions of Law

The defendant is guilty as charged on Counts One, Two, Three and Four of the indictment.

This the 11th day of October, 1956.

oyd Sloan, United States District Judge.

[fol. 103] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

v.

ROY JONES.

JUDGMENT AND COMMITMENT—October 24, 1956

No. 4901 Criminal Indictment in four (4) counts for violation of U. S. C., Title 26, Secs. 5601, 5216, 5008, 5681.

On this 24th day of October, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Wesley R. Asinof, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of the Court of guilty, of the offenses of Violation of Internal Revenue Liquor Laws, as charged in Cts. 1, 2, 3 and 4, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years, and that he pay a fine of One Hundred and No/100 ($100.00) Dollars on the first count and a fine of Five [fol. 104] Hundred and No/100 ($500.00) Dollars on the second count of the indictment, but that he not stand committed for said fines.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United Staes (sic) Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Boyd Sloan, United States District Judge.

Filed in Clerk's Office this October 24th, 1956.

The Court recommends commitment to:

F. L. Beers, Clerk. By B. G. Nash.

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION

(Title omitted)

NOTICE OF APPEAL—Filed October 24, 1956

Name and Address of Appellant:
Roy Jones, Route 3, Dawsonville, Georgia.

Name and Address of Appellant's Attorney:
Wesley R. Asinof, 419 Atlanta National Bldg. Atlanta, Georgia.

Offense:

Possessing an unregistered distillery; making and fermenting mash; possessing untax paid liquors, and working in an unregistered distillery.

[fol. 105] Concise Statement of Judgment or Order, Giving Date, and any Sentence:

3 years in custody of attorney general & 600.00 fine, not to stand committed, Oct. 24, 1956.

Name of Institution Where Now Confined, if not on Bail:

On appeal bond in the sum of $3000.00 as fixed by order of Court.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated October 24, 1956.

Wesley R. Asinof, Appellant's Attorney.

* * * * * * *

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111]

* * * * * * *

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 14, 1957 (omitted in printing).

[fol. 112] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16396

ROY JONES, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

OPINION—June 10, 1957

Before Borah, Rives and Brown, Circuit Judges.

Per Curiam: On a trial before the court without a jury, the appellant was convicted of knowingly having in possession an unregistered still in violation of Section 5601, Title 26, United States Code, making and fermenting mash in violation of Section 5216 of said Title, possessing 413 gallons of nontaxpaid distilled spirits in violation of Section 5008 of said Title, and of working in an unregistered dis-[fol. 113] tillery in violation of Section 5681 of said Title. The sole insistence on error goes to the overruling by the district court of the appellant's motion to suppress. The findings of fact made by the court after hearing the evidence are not attacked. In our opinion, those findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress. Since such findings and conclusions have not previously been published, they are attached as an Exhibit to this opinion. The judgment is

AFFIRMED.

EXHIBIT

"(TITLE OMITTED.)

"Roy Jones has filed a motion in this Court to direct that certain property, to-wit: One 6 horsepower boiler, electric fuel burner and about 15 barrels, be suppressed

as evidence and ordered returned to him on the ground that on the premises of the residence of Roy Jones on No. 136 Highway in Dawsonville, Georgia, Route 3, said articles were unlawfully and illegally seized from said premises on May 2, 1956, by federal officer W. W. Langford and four others whose names are unknown.

"The matter came on for a hearing before the Court, evidence for both parties was heard; memoranda of authority submitted and after due consideration the Court makes the following:

[fol. 114] "Findings of Fact.

"On April 30, 1956, the federal investigators of the Alcohol & Tobacco Tax Unit of the Internal Revenue Department received information that Roy Jones was operating an illicit distillery in his home in Dawson County, Georgia. The Government refused to reveal the source of this information and the Court cannot determine that such source was reliable; however, the defendant, Roy Jones, had previously been found to be operating an illicit distillery in his home and the federal officers knew of this fact and they did credit the information and on that date made an investigation near the home of Roy Jones.

"In a hollow to the rear of Roy Jones' house, the officers found spent mash flowing down a branch and upon investigation discovered that it was running from a concealed rubber hose which, upon being traced, led in the direction of the defendant, Roy Jones' home, tracing said hose to within about 75 yards of his home. On the following day, the federal and state officers placed themselves across the public highway from Roy Jones' home concealing themselves in a woods to where they had plain view of the defendant, Roy Jones' house and while there they heard the noise of a blower burner, this blower burner being of the type generally used in Dawson County, Georgia, to heat illicit distilleries, no other use for such a blower burner being known in said county. The officers also smelled the odor of hot mash coming from the direction of the house and they kept the house under surveillance until after 2:00 o'clock in the [fol. 115] morning of May 2 and during this time they heard

much activity, the moving of heavy objects about, inside the house, with the blower burner operating as late as 2:00 o'clock A.M.

"During the watch over Roy Jones' house, the officers observed a motor vehicle go into the yard of the residence and during the stay of the vehicle the blower burner did not run but after the vehicle left, the sound of the blower burner was again heard.

"Shortly after 2:00 A.M., on May 2, 1956, the officers left their post of observation and returned to Gainesville and during the day of May 2, 1956, federal officer Woody W. Langford went before United States Commissioner in Gainesville, Georgia, and obtained a daylight search warrant to search the dwelling and premises of the defendant, Roy Jones; Langford at that time making affidavit before the United States Commissioner which stated in substance what the officers had discovered and asserted the belief that there was an illicit distillery in the home of Roy Jones.

"Late in the afternoon the officers returned to their post of observation, near the home of Roy Jones, and desiring to seize any vehicles engaged in removing the illicit liquors they did not immediately execute the daylight search warrant but waited for some vehicle to arrive. Since no vehicle came to the dwelling until after dark, they did not execute the daylight search warrant but remained on watch until after dark and until about 9:00 o'clock P.M. About 9:00 P.M. some person left the residence of Roy Jones [fol. 116] and went up the road toward the home of Frank Jones, the father of Roy Jones, and where Millard and Grady Jones, brothers of Roy Jones, lived and at that time the officers overheard a conversation when it was asked of some one in Roy Jones' house if they were ready for the truck to be brought to the house. A short time later, a truck left the yard of the home of Roy Jones' father nearby and drove into the yard of Roy Jones' house and around into the back where the officers heard a thumping sound as though there was activity with heavy objects and shortly thereafter the truck pulled out from the rear of Roy Jones' house and started to drive into the highway but it was rainy and wet and as the truck tried to pull up the incline from the yard into the highway it became stuck

and at that point the officers made the initial move to seize the truck and raid the home of Roy Jones. They arrested James McKinney and William Grady Jones, occupants of the truck, and seized 413 gallons of nontaxpaid liquor which was loaded on the truck. About that time a car drove up into the yard of Roy Jones' house and in the car was the wife of Roy Jones with his children, and Mrs. Lois Willis, the sister of Mrs. Roy Jones and her children. Mrs. Roy Jones undertook to block the doorway to keep the officers from entering the dwelling house, telling the officers to wait until her husband, Roy Jones, returned. A twelve year old son of Roy Jones obtained a shotgun and while he did not point it at the officers, he held it at port arms in what the officers considered a threatening manner and the first entry into the residence was made by State Agent Hollingsworth to secure the shotgun and take it away from the child. Mrs. [fol. 117] Jones asked officer Woody Langford if he had a search warrant and Langford replied that he did not need one and the officers then searched the premises without a search warrant.

"The house had only two or three doors and there were five officers watching the residence and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary.

"Upon a search of the premises, it was found that in a downstairs room of the house there was a complete distillery consisting in part of an upright boiler with a blower burner with which to heat it, and in the attic there was 2400 gallons of mash with hose pipes leading to the outside for the disposition of the spent mash. There were no signs posted showing it to be a registered distillery. It was fully setup and ready for operation and had been recently operated. A small quantity of nontaxpaid liquor was found in the residence also.

"The Court finds that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed and therefore the Court finds that probable cause for the search existed at the time the search was made.

Conclusions of Law.

"Only unreasonable searches are proscribed by the Fourth Amendment. There is no precise formula for determining reasonableness. Every case must turn on its own facts and circumstances.

[fol. 118] "If the officer has no warrant, he must show probable cause.

"Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged: See Dumbra v. United States, 268 U.S. at page 441. The search here was not unreasonable and did not violate the Fourth Amendment because the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime search warrant. See United States v. Rabinowitz, 339 U. S. 56 at page 66, overruling Trupiano v. United States, 334 U.S. 699, to the extent that the Trupiano case required a search warrant solely upon the basis of practicability of procuring rather than upon the unreasonableness of the search, stating that: 'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'

"Judgment.

"The motion to suppress is overruled and denied.

"This the 11 day of October, 1956.

"BOYD SLOAN,
"United States District Judge.

"Filed Oct. 11, 1956."

[fol. 119] In United States Court of Appeals

No. 16396

Roy Jones,

v.

United States of America.

Judgment—June 10, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

[fol. 120] In the United States Court of Appeals for the Fifth Circuit

Number 16,396

Roy Jones, Appellant,

v.

United States of America, Appellee.

Petition for Rehearing—Filed June 25, 1957

Now comes appellant, Roy Jones, within twenty-one days after the affirmance of the judgment by this court, and petitions this court to grant him a rehearing on the following grounds:

—1—

The trial court misconstrued the ruling of the Supreme Court in the case of United States versus Rabinowitz, 339 U.S. 56, in determining that the practicability of procuring

a search warrant was no longer an element in determining the reasonableness of a search without a warrant, and this court has affirmed this principal (sic) of law erroneously.

—2—

[fol. 121] This court overlooked the trial court's findings of fact in this case to the effect that "The house had only two or three doors and there were five officers watching the residence and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary."

—3—

This court overlooked, and so did the trial judge, the case of Johnson v. United States, 333 U.S. 10, wherein the Supreme Court, in passing upon a similar contention as to an unreasonable search and seizure without a warrant, held:

"No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear."

—4—

This court overlooked the fact that the trial court misconstrued the case of United States versus Rabinowitz, 339 U.S. 56, in that the ruling of the Rabinowitz case turned upon the validity of a search of premises incidental to the execution of a valid warrant of arrest, whereas the ruling of the case at bar turned upon the search of a dwelling [fol. 122] house at night without a valid warrant to search or to arrest where sufficient time existed to take necessary steps to procure the necessary consent of a judicial officer.

—5—

This court has overlooked a prior decision of this same court in the case of Clay v. United States, 239 Fed. 2nd, 196, which is directly in point, holding that "availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause."

—6—

This court has overlooked the recent ruling of the Supreme Court in the case of Kremen v. United States, Decided May 13, 1957 (77 Supreme Court Reporter 828) Advance sheet dated June 1, 1957, wherein it was held, after reversing a Circuit Court of Appeals on writ of certiorari:

"The seizure of the entire contents of the house and its removal some 200 miles away to the F. B. I. offices for the purpose of examination are beyond the sanction of any of our cases."

—7—

This court overlooked the case of Rent v. United States (5th Circuit) 209 Fed. 2nd, 893, wherein this court has previously held that "one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take the decision into his own hands. The officer had ample opportunity to apply for a search warrant and in our opinion a search of the automobile [fol. 123] without a warrant was not justified."

—8—

This court overlooked the principle of law held in the case of Johnson v. United States, 333 U. S. 10, involving the search of a person's room without a warrant to arrest or search where sufficient time existed to procure a valid warrant from an impartial magistrate, and overlooked

the fact that the Rabinowitz case, supra, overruled the Trupiano case, 334 U. S. 699, "to the extent that Trupiano v. United States requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest."

—9—

Movant avers that the trial court in this case was in error in deciding in his conclusions of law that "If the officer has no warrant, he must show probable cause." Movant shows that under the law an officer must first have probable cause in order to procure a valid search warrant from a magistrate and if an officer could justify a search of a dwelling upon probable cause without a warrant there would never be any necessity for the issuance of a search warrant. In other words, movant contends that probable cause is a necessary element toward procuring a valid search warrant from a magistrate, and is never the substitute for the judicial determination.

—10—

This court overlooked the fact that in the findings of fact by the trial judge there is no finding that any of the occupants of the house were in the process of taking flight or attempting in any way to destroy any evidence so as to create any emergency requiring an immediate raid on [fol. 124] the appellant's home without first procuring the consent of an impartial, detached magistrate.

—11—

The court overlooked the trial judge's findings of fact that during the day of May 2nd, 1956, one of the officers had procured a daylight search warrant from the U. S. Commissioner in Gainesville, Georgia, and that they arrived back to the house to be searched during the daylight hours, but did not choose to execute the warrant at that time, but they waited until after dark to make the search. Movant avers that the failure to execute the warrant during the daylight hours rendered the nighttime

search void and illegal, and that this court has overlooked this fact in affirming the judgment of the trial court.

Wherefore, movant prays that a rehearing be granted, and that the judgment of the trial court be reversed.

/s/ Wesley R. Asinof, Attorney for Appellant (Movant), 419 Atlanta National Building, Atlanta, Georgia.

CERTIFICATE OF COUNSEL

I, Wesley R. Asinof, of counsel for Appellant, Roy Jones, do hereby certify that I have this day mailed three (3) copies of the foregoing petition for rehearing to Hon. James W. Dorsey, U. S. Attorney, care of Old Post Office Building, Atlanta, Georgia, and I do further certify that this petition for rehearing is presented in good faith and not for delay.

This 24th day of June, 1957.

/s/ Wesley R. Asinof

[fol. 125] IN UNITED STATES COURT OF APPEALS

(Title omitted)

MINUTE ENTRY OF ORDER DENYING REHEARING—July 3, 1957

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 126] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Title omitted)

MOTION FOR STAY OF MANDATE—Filed July 12, 1957

Appellant, Roy Jones, now comes within ten (10) days from the date of the judgment of this Court denying his petition for rehearing and prior to the return of the man-

date to the trial court, and moves this court to order the Clerk thereof to stay the issuance of the mandate for a period of thirty (30) days and until the Supreme Court of the United States passes on the petition for certiorari to review this case, and appellant here and now in good faith avers that he does intend to apply to the Supreme Court of the United States for the writ of certiorari to review the judgment of this court in this case within the time provided for by the rules.

/s/ Wesley R. Asinof
Attorney for Appellant

Certificate of Service (omitted in printing).

[fol. 127] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Title omitted)

ORDER STAYING MANDATE—July 13, 1957

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days from July 3, 1957; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within sixty days from July 3, 1957 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of sixty days from July 3, 1957, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 13th day of July, 1957.

/s/ Richard T. Rives,
United States Circuit Judge.

[fol. 128] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 129] SUPREME COURT OF THE UNITED STATES

No. 331, October Term, 1957

(Title omitted)

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

ROY JONES,

Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA

Number 331

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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WESLEY R. ASINOF

Attorney for Petitioner

419 Atlanta National Building,

Atlanta, Georgia

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CITATIONS

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IN THE

Supreme Court of the United States

ROY JONES,

Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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Now comes ROY JONES, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted on four counts for violating the Internal Revenue laws of the United States relating to liquor in the United States District Court for the Northern District of Georgia, Gainesville Division. Prior

to the trial of the case on its merits petitioner filed a written motion to suppress certain evidence on the ground that the evidence was obtained by federal officers from the dwelling house of petitioner at night without lawful warrant or authority and forcibly and against his will. This issue was tried before the Court, and upon the hearing evidence was introduced by petitioner that five officers raided the home and dwelling house of petitioner at night without a nighttime search warrant and found therein a distillery consisting in part of an upright boiler with a blower burner and 2,400 gallons of mash with hose pipes and a small quantity of non-tax paid liquor. Petitioner was not at home at the time of the raid, but his wife and 12 year old son refused to allow the officers access to the premises and the officers were forced to gain entrance over the utmost show of force upon the part of petitioner's family. Evidence was offered by petitioner, and the trial judge so found in his findings of fact, that five officers were present and there were only two or three doors to the dwelling "and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary." (Rec. p. 99.) The Court found "that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed" and that "probable cause for the search existed at the time the search was made." (Rec. p. 100.)

The trial judge, in his conclusions of law on this issue, held that "If the officer has no warrant, he must show probable cause." (Rec. p. 100.) In so holding that a search warrant was no longer necessary if probable cause

for the search existed the trial judge relied upon the case of United States versus Rabinowitz, 339 U.S. 56. The motion to suppress was overruled and denied by the trial judge and the United States Court of Appeals for the Fifth Circuit, on the appeal from petitioner's conviction, affirmed this ruling and held that "the findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress." A motion for rehearing was filed by petitioner, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on June 10, 1957. A petition for rehearing was denied July 3, 1957. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

(b) The constitutional provision of the Constitution of the United States, the construction of which is involved in this application for certiorari, is as follows:

Amendment Four, United States Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(c) The statute of the United States, the validity of

which is involved in this application for certiorari, is as follows:

"Rule 41, (c) Federal Rules of Criminal Procedure." providing in part: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time."

(d) This petition for certiorari is being filed in this Court within 30 days from the date of the judgment denying the motion or petition for rehearing.

(e) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:—

(1) The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

(2) The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(3) The United States Court of Appeals for the Fifth Circuit has misconstrued a decision of this Court involving the construction of a constitutional amendment, and has, by its ruling, eliminated the necessity of a search warrant in order to search a dwelling house at night.

(4) The United States Court of Appeals for the Fifth

Circuit has decided a question of gravity and importance involving federal criminal procedure as it relates to searches and seizures without warrant based upon mere probable cause.

THE QUESTIONS PRESENTED

1. Whether a search of a person's dwelling house at night, and the seizure of articles therefrom by federal officers, is justified without a search warrant issuing from a magistrate when it is practicable to secure a search warrant and no justification or excuse is offered by the Government except some slight delay incident to preparing the necessary papers.

2. Whether the decision by this Court in the case of United States versus Rabinowitz, 339 U.S. 56 stating that: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable," eliminates the necessity of a search warrant in all cases where probable cause for the search exists, or whether the decision in that case is applicable only in cases where the search is made incidental to a lawful arrest.

3. Whether federal officers acting on probable cause, and without a search warrant, are authorized to conduct a search of a dwelling house at night where there exists no pressing emergency or other reasons justifying their action, and under such circumstances that a United States Commissioner, acting under and by virtue of Rule 41 (c) of the Federal Rules of Criminal Procedure, would be required to have positive affidavits before authorizing such a search.

4. Whether the practicability of procuring a search

warrant is no longer an element in determining the reasonableness of a search without a warrant.

5. Whether a search without a warrant is reasonable, within the meaning of the Fourth Amendment, because the federal officer has probable cause to search, or whether the "probable cause" provision of the Fourth Amendment is meant to prescribe the duty of the issuing magistrate.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Due to the decision of the trial judge in this case, affirmed by the United States Court of Appeals for the Fifth Circuit, search warrants are no longer essential in any case as long as there exists probable cause for the search without a warrant.

2. Prior to the decision of this Court in the Rabinowitz case, supra, search warrants were necessary prerequisites to the validity of a search of a dwelling unless the Government could show some urgent or pressing emergency justifying the search to be made without a warrant, and probable cause was a necessary element to be sustained even in those cases where search warrants had been procured from magistrates.

3. The United States Court of Appeals for the Fifth Circuit, in affirming the decision of the trial judge in this case, completely ignored and overlooked the decisive decision of this Court in the case of Johnson v. United States, 333 U.S. 10, where this Court held the search of a person's hotel room to be unreasonable where there was no warrant in existence authorizing the search, and where sufficient time existed to procure one, even though prob-

able cause existed for the search. This Court held in that case that the probable cause should have been determined by a detached and impartial magistrate.

4. The United States Court of Appeals for the Fifth Circuit, in affirming the decision of the trial judge in this case holding the Rabinowitz case, supra, to be controlling on the questions involved, completely ignored and overlooked the more recent case from this Court of United States versus Jeffers, 342 U.S. 48, holding that: "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. * * * Only where incident to a valid arrest, * * * or in 'exceptional circumstances' * * * may an exemption lie, and then the burden is on those seeking the exemption to show the need for it. * * * "

APPENDIX

Petitioner herein appends to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner
419 Atlanta National Building
Atlanta, Georgia

JUDGMENT

Extract from the Minutes of June 10, 1957.

ROY JONES,

No. 16396. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16396

ROY JONES,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(June 10, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

PER CURIAM: On a trial before the court without a jury, the appellant was convicted of knowingly having in possession an unregistered still in violation of Section 5601, Title 26, United States Code, making and fermenting mash in violation of Section 5216 of said Title, possessing 413 gallons of nontaxpaid distilled spirits in violation of Section 5008 of said Title, and of working in an unregistered distillery in violation of Section 5681 of said Title. The sole insistence on error goes to the overruling

by the district court of the appellant's motion to suppress. The findings of fact made by the court after hearing the evidence are not attacked. In our opinion, those findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress. Since such findings and conclusions have not previously been published, they are attached as an Exhibit to this opinion. The judgment is

AFFIRMED.

EXHIBIT

"(TITLE OMITTED.)

"Roy Jones has filed a motion in this Court to direct that certain property, to-wit: One 6 horsepower boiler, electric fuel burner and about 15 barrels, be suppressed as evidence and ordered returned to him on the ground that on the premises of the residence of Roy Jones on No. 136 Highway in Dawsonville, Georgia, Route 3, said articles were unlawfully and illegally seized from said premises on May 2, 1956, by federal officer W. W. Langford and four others whose names are unknown.

"The matter came on for a hearing before the Court, evidence for both parties was heard; memoranda of authority submitted and after due consideration the Court makes the following:

"Findings of Fact.

"On April 30, 1956, the federal investigators of the Alcohol & Tobacco Tax Unit of the Internal Revenue Department received information that Roy Jones was operating an illicit distillery in his home in Dawson

County, Georgia. The Government refused to reveal the source of this information and the Court cannot determine that such source was reliable; however, the defendant, Roy Jones, had previously been found to be operating an illicit distillery in his home and the federal officers knew of this fact and they did credit the information and on that date made an investigation near the home of Roy Jones.

"In a hollow to the rear of Roy Jones' house, the officers found spent mash flowing down a branch and upon investigation discovered that it was running from a concealed rubber hose which, upon being traced, led in the direction of the defendant, Roy Jones' home, tracing said hose to within about 75 yards of his home. On the following day, the federal and state officers placed themselves across the public highway from Roy Jones' home concealing themselves in a woods to where they had plain view of the defendant, Roy Jones' house and while there they heard the noise of a blower burner, this blower burner being of the type generally used in Dawson County, Georgia, to heat illicit distilleries, no other use for such a blower burner being known in said county. The officers also smelled the odor of hot mash coming from the direction of the house and they kept the house under surveillance until after 2:00 o'clock in the morning of May 2 and during this time they heard much activity, the moving of heavy objects about, inside the house, with the blower burner operating as late as 2:00 o'clock A.M.

"During the watch over Roy Jones' house, the officers observed a motor vehicle go into the yard of the residence and during the stay of the vehicle the blower burner did

not run but after the vehicle left, the sound of the blower burner was again heard.

"Shortly after 2:00 A.M., on May 2, 1956, the officers left their post of observation and returned to Gainesville and during the day of May 2, 1956, federal officer Woody W. Langford went before United States Commissioner in Gainesville, Georgia, and obtained a daylight search warrant to search the dwelling and premises of the defendant, Roy Jones; Langford at that time making affidavit before the United States Commissioner which stated in substance what the officers had discovered and asserted the belief that there was an illicit distillery in the home of Roy Jones.

"Late in the afternoon the officers returned to their post of observation, near the home of Roy Jones, and desiring to seize any vehicles engaged in removing the illicit liquors they did not immediately execute the daylight search warrant but waited for some vehicle to arrive. Since no vehicle came to the dwelling until after dark, they did not execute the daylight search warrant but remained on watch until after dark and until about 9:00 o'clock P.M. About 9:00 P.M. some person left the residence of Roy Jones and went up the road toward the home of Frank Jones, the father of Roy Jones, and where Millard and Grady Jones, brothers of Roy Jones, lived and at that time the officers overheard a conversation when it was asked of some one in Roy Jones' house if they were ready for the truck to be brought to the house. A short time later, a truck left the yard of the home of Roy Jones' father nearby and drove into the yard of Roy Jones' house and around into the back where the officers heard a thumping sound as though there was activity with heavy objects and shortly thereafter the truck pulled

out from the rear of Roy Jones' house and started to drive into the highway but it was rainy and wet and as the truck tried to pull up the incline from the yard into the highway it became stuck and at that point the officers made the initial move to seize the truck and raid the home of Roy Jones. They arrested James McKinney and William Grady Jones, occupants of the truck, and seized 413 gallons of nontaxpaid liquor which was loaded on the truck. About that time a car drove up into the yard of Roy Jones' house and in the car was the wife of Roy Jones with his children, and Mrs. Lois Willis, the sister of Mrs. Roy Jones and her children. Mrs. Roy Jones undertook to block the doorway to keep the officers from entering the dwelling house, telling the officers to wait until her husband, Roy Jones, returned. A twelve year old son of Roy Jones obtained a shotgun and while he did not point it at the officers, he held it at port arms in what the officers considered a threatening manner and the first entry into the residence was made by State Agent Hollingsworth to secure the shotgun and take it away from the child. Mrs. Jones asked officer Woody Langford if he had a search warrant and Langford replied that he did not need one and the officers then searched the premises without a search warrant.

"The house had only two or three doors and there were five officers watching the residence and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary.

"Upon a search of the premises, it was found that in a downstairs rooms of the house there was a complete distillery consisting in part of an upright boiler with a blower burner with which to heat it, and in the attic

there was 2400 gallons of mash with hose pipes leading to the outside for the disposition of the spent mash. There were no signs posted showing it to be a registered distillery. It was fully setup and ready for operation and had been recently operated. A small quantity of nontax-paid liquor was found in the residence also.

"The Court finds that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed and therefore the Court finds that probable cause for the search existed at the time the search was made.

Conclusions of Law.

"Only unreasonable searches are proscribed by the Fourth Amendment. There is no precise formula for determining reasonableness. Every case must turn on its own facts and circumstances.

"If the officer has no warrant, he must show probable cause.

"Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged. See Dumbra v. United States, 268 U.S. at page 441. The search here was not unreasonable and did not violate the Fourth Amendment because the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime

search warrant. See United States v. Rabinowitz, 339 U.S. 56 at page 66, overruling Trupiano v. United States, 334 U.S. 699, to the extent that the Trupiano case required a search warrant solely upon the basis of practicability of procuring rather than upon the unreasonableness of the search, stating that: 'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'

"Judgment.

"The motion to suppress is overruled and denied.

"This the 11 day of October, 1956.

"BOYD SLOAN,
"United States District Judge.

"Filed Oct. 11, 1956."

A True Copy

Test: s/Edward W. Wadsworth
Clerk U. S. Court of Appeals, Fifth Circuit
New Orleans, La.

(Seal)

IN THE

Supreme Court of the United States

ROY JONES,

Petitioner

vs.

THE UNITED STATES OF AMERICA

BRIEF OF LAW ON BEHALF OF PETITIONER

ARGUMENT AND CITATION OF AUTHORITY

The single question before this Court is whether or not federal officers are justified in invading the privacy of a man's home at night, searching it forcibly and against his will and seizing therefrom evidence of crime, without lawful warrant or authority issuing from a magistrate or other judicial officer but upon probable or reasonable cause to suspect that a felony is being committed and where sufficient time exists to procure a search warrant.

From the findings of fact made by the trial judge it appears that the federal officers had the premises in question under surveillance for two or three days. During this constant surveillance they were able to ascertain and assert a belief under oath that there was an illicit distillery located in the home of Roy Jones. During the day of May 2nd one of the officers appeared before the U. S. Commissioner in Gainesville; and made affidavit stating on information and belief that there was an illicit distillery on the premises. Upon this affidavit, the Commissioner issued a daytime search warrant. The officers

did not execute this warrant during the daytime, although they had ample opportunity to do so. They waited until about 9:00 o'clock P.M. that night, after dark. At that time the officers attempted to gain entrance into the dwelling of Roy Jones who was not at home at that time. Mrs. Jones attempted to block the doorway requesting the officers to wait until her husband arrived. A twelve year old son of the appellant obtained a shotgun and held it in a threatening manner, in an attempt to keep the officers from searching the premises. Mrs. Jones asked the officer if he had a search warrant and he stated that he did not need one. They then searched the house and seized the contraband articles.

Here was a forcible search and seizure without warrant in a style and manner that would do justice to a police state in the hey-day of their reign. There was no doubt that the officers had probable cause for the procurement of the search warrant, because they did procure one that very day. Consequently all their probable cause for believing that a felony had been committed was merged in the search warrant. The officers placed their evidence before a judicial officer who thereupon rightfully empowered them with authority to search the premises *in the daytime*. Inasmuch as no person had sworn to *positive* facts in the affidavit, this was all the authority the United States Commissioner could impart. Rule 41, Federal Rules of Criminal Procedure. However, the officers did not carry out the mandate of the search warrant by searching the premises during the daytime. Instead, they waited until after it became dark, the period when the search warrant had slept. Then suddenly, without the cloak of protection of the search warrant, the officers struck like lawless men in the night. Here the raid on the

appellant's dwelling was proceeding by the officers of the government at a season of the night when not even the entire judicial power of the United States Government could have lawfully empowered them to search the premises on mere information or belief. Yet these officers, sworn to ferret out crime and arrest law violators, took into their own hands a much greater authority. Had these officers presented the facts they had in the form of an affidavit based on their belief before a United States Commissioner just immediately preceding their nighttime raid, a nighttime search warrant would have been refused, based on Rule 41.

The very able trial judge, in his findings of fact, recognized that there were only two or three doors to the house and there were five officers watching the residence, "and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary."

While the trial judge recognized that under the facts of the case it would have been practicable for the officers to procure a nighttime search warrant, he did not believe this to be any longer an element necessary to sustain the validity of a search and seizure. The trial judge relied upon the case of United States versus Rabinowitz, 339 U. S., 56, at page 66, as authority for so holding. However, we respectfully take exception with the learned trial judge in this interpretation.

In the case of *Johnson v. United States*, 333 U. S. 10, (68 S. Ct. 367), where evidence of opium was suppressed because of entry into the room of defendant without a warrant, but based on probable cause, it was held:

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

"There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.

"But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

Shortly thereafter, and at the same term of the Supreme Court, the question of the validity of a search and seizure without a warrant where sufficient time existed for the

procurement of a warrant came before the Court in the case of *Trupiano v. United States*, 334 U. S. 699, (68 S. Ct. 1229) and that Court again reiterated the principle that the search and seizure was illegal because the officers had sufficient time to secure a warrant from the magistrate before making the raid.

Two years later the United States Supreme Court had before it, in the case of *United States v. Rabinowitz*, 339 U. S. 56, (70 S. Ct. 430), the question of the validity of the search of a person's room *as an incident to a lawful arrest upon a valid warrant of arrest*. It was this latter decision that became the basis for the trial judges decision in the case at bar. It is true that in the Rabinowitz case, supra, the Supreme Court said: "To the extent that Trupiano v. United States, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest*, that case is overruled." (Italics added). However, by a careful reading of the Rabinowitz case, supra, it is to be noted that in that case it appeared that Government agents there placed the defendant under arrest pursuant to a *valid arrest warrant*, and the only real issue decided by the Supreme Court was as to the lawfulness of the search *as incidental to the lawful arrest*. In other words the search of the room was held to be "reasonable" because it was *incidental to a lawful arrest*, and consequently, under the particular facts of that case, the practicability of procuring a search warrant was not actually involved.

To distinguish the Rabinowitz case, supra, from the other cases involving unlawful searches and seizures, the Court ruled:

"The arrest was therefore valid in any event, and

respondent's person could be lawfully searched." Again the Court ruled: "We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; * * * * * *"

Further on, in the same opinion, on the question of reasonableness, and to clarify the distinction between searches incident to lawful arrest and searches not incident to lawful arrest, the Supreme Court ruled:

"Lest the holding that such a search of an unoccupied building was unreasonable be thought to have broader significance the Court carefully stated in conclusion: 'This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest'."

The Rabinowitz case, supra, insofar as it overrules the Trupiano case, supra, does so only to this extent:

"To the extent that Trupiano v. United States, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest*, that case is overruled." (Italics added.)

The Rabinowitz case, supra, does not overrule the older cases of Johnson, supra, and Agnello, supra, and its holding is applicable *only* in searches and seizures made *incident to a lawful or valid arrest*. Since the Rabinowitz decision, this Court has again been confronted with the same situation, in the case of

UNITED STATES v. JEFFERS, 342 U.S. 48, and held:

"Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judi-

cial processes. See Weeks, v. United States, 1914, 232 U.S. 383, 34 S.Ct. 341; Agnello v. United States, 1925, 269 U.S. 20, 46 S.Ct. 4. Only where incident to a valid arrest, United States versus Rabinowitz, 1950, 339 U.S. 56, 70 S.Ct. 430, or in 'exceptional circumstances,' Johnson v. United States, 1948, 333 U.S. 10, 68 S.Ct. 367, may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, McDonald v. United States, 1948, 335 U.S. 451, 456, 69 S.Ct. 191."

Here was the judicial interpretation by this Court of the Rabinowitz decision construing and interpreting its meaning, and giving it effect. However, the United States Court of Appeals for the Fifth Circuit refused to recognize its force and effect. Here the Court ruled that only on two occasions, viz: (1) incident to a valid arrest, and (2) in exceptional circumstances may "an exemption lie." The Government does not show in this case any exception or exemption, but the trial judge, in his order, merely upholds Rabinowitz as the *rule* instead of the *exception*.

The learned trial judge in this case at bar held that "If the officer has no warrant he must show probable cause." Such reasoning would lead to the inevitable conclusion that search warrants are no longer necessary in any case. First, a valid search warrant may only issue by a United States Commissioner when and if sufficient evidence of probable cause is made to appear before him. (RULE 41, Federal Rules of Criminal Procedure.) This necessarily means that probable cause is a necessary element before a magistrate may act, so an officer must have probable cause to procure a warrant. However, according to the trial judge's ruling in this case an officer

does not need a warrant so long as he has probable cause. The conclusion therefore inevitably follows that if these two premises be true a search warrant is no longer necessary. This can not be the law, because if it were it would bring about the complete and utter destruction of the need for an impartial magistrate to protect persons from unlawful searches and seizures by zealous law enforcement officers who would be empowered to act on their own discretion.

The Fifth Circuit Court of Appeals has construed the Rabinowitz case, supra, different from that of the trial judge in the case at bar, in the case of *Rent v. United States*, 209 Fed. 2nd, 893, as follows

> "The Government apparently takes the position that, since the decision in United States versus Rabinowitz, supra, the practicability of procuring a search warrant is not to be considered in deciding whether the search without a warrant was reasonable. We do not understand that the decision in that case went so far. * * * * * * *
>
> "The Court did not overrule the other cases referred to in the vigorous dissent of Mr. Justice Frankfurter and did not criticize the able opinion of Chief Justice Taft in Carroll v. United States, supra. Rather, the Court said that whether the search was reasonable 'depends upon the facts and circumstances—the total atmosphere of the case.'
>
> "We think that one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take

> the decision into his own hands. The officer had ample opportunity to apply for a search warrant and in our opinion a search of the automobile without a warrant was not justified."

Thus, here is a clear interpretation of the Rabinowitz case, supra, by the 5th Circuit Court of Appeals. The trial judge in the case at bar, in construing this case according to the standards of the Rabinowitz case, a case involving a search incident to a lawful arrest upon a valid warrant, has overlooked or misapplied all the other rulings by the Supreme Court that were not overruled therein, such as the Johnson case, supra, and many others.

In numerous cases prior to the Rabinowitz case, supra, the Supreme Court had consistently held that the practicability of procuring a search warrant was an element to be considered in determining the reasonableness of a search without a warrant. In the case of *Agnello v. United States*, 269 United States, 20, (46 S. Ct. 4,) it was held:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. *Absence of any judicial approval is persuasive authority that it is unlawful.* See Entick v. Carrington, 19 Howard's State Trials, 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*" (Italics added.)

In *United States v. Lefkowitz*, 285 U. S. 452, (52 S. Ct. 420,) it was held:

> "Indeed, the informed and deliberate determina-

tions of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

In another very recent decision from the 5th Circuit this court again passed on and construed the Rabinowitz case, supra. In the case of *Clay v. United States,* 239 Fed. 2nd, 196, this court said:

> "Finally, while the ease and practicability of obtaining the warrant of arrest or to search, Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, is no longer an invariable rule of thumb, United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, *availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause.*"

Finally, in conclusion, appellant calls to the attention of the Court one of the mandatory provisions of Rule 41 (c) of the Federal Rules of Criminal Procedure, providing for the issuance and contents of search warrants. After directing the manner of procedure, the rule then states:

> "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time."

A United States Commissioner's duty would be clear. If the officers of the government had appeared before him

with the information that was available to them just prior to the entrance into appellant's home, he would have been authorized to "direct that it be served in the daytime," inasmuch as no officer had *positive* information as to the existence of the still in the house. If, then, the Commissioner would have been without authority to lend judicial sanction to a nighttime search, can the authority of the arresting officer rise to greater heights than one maintaining judicial authority? To so hold in the affirmative would be to destroy and render useless the impotent Rule 41.

The search of the appellant's home at night, invasion of his family's privacy and seizure of the articles contained in his home was a clear violation of the Fourth mendment to the Constitution of the United States. The judgment of the U. S. Court of Appeals affirming the judgment overruling and denying the motion to suppress should be reversed.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner
419 Atlanta National Building,
Atlanta, Georgia

IN THE

Supreme Court of the United States

October Term, 1957

NO. 331

ROY JONES, Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF ON BEHALF OF PETITIONER

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IN THE

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BRIEF ON BEHALF OF PETITIONER

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the 5th Circuit in this case is officially reported in 245 Federal Reporter, 2nd Series, 32.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1254 (1), and under and by virtue of Title 18 U. S. C. 3772 and within the time provided for in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666, 54 S. Ct. XXXIX), and Rule 22 (2) of the Supreme Court rules.

Jurisdiction of this court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision, and has misconstrued a decision of this court involving the construction of a constitutional amendment, and has, by its ruling, eliminated the necessity of a search warrant in order to search a dwelling house at night, and has decided a question of gravity and importance involving federal criminal procedure as it relates to searches and seizures without warrant based upon mere probable cause, all as provided for by rule 19 (1) (b) of the rules of the Supreme Court governing review by this court on certiorari and the grounds therefor.

The judgment of the Court of Appeals was entered on June 10, 1957. A petition for rehearing was denied July 3, 1957. The petition for certiorari was filed and docketed in the Supreme Court of the United States July 31, 1957, within 30 days after the date of the final

judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The constitutional provision of the Constitution of the United States, the construction of which is involved in this application for certiorari, is as follows:

"IV Amendment, U. S. Constitution:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(b) The statute of the United States, the construction of which is involved in this application for certiorari, is as follows:

"Rule 41 (c) Federal Rules of Criminal Procedure:

"The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time."

QUESTIONS PRESENTED FOR REVIEW

1. Whether a search of a person's dwelling house at night, and the seizure of articles therefrom by federal officers, is justified without a search warrant issuing from a magistrate when it is practicable to secure a search warrant and no justification or excuse is offered by the Gov-

ernment except some slight delay incident to preparing the necessary papers.

2. Whether the practicability of procuring a search warrant is no longer an element in determining the reasonableness of a search without a warrant.

3. Whether a search without a warrant is reasonable, within the meaning of the Fourth Amendment, because the federal officer has probable cause to search, or whether the "probable cause" provision of the Fourth Amendment is meant to prescribe the duty of the issuing magistrate,

4. Whether federal officers acting on probable cause, and without a search warrant, are authorized to conduct a search of a dwelling house at night where there exists no pressing emergency or other reasons justifying their action, and under such circumstances that a United States Commissioner, acting under and by virtue of Rule 41 (c) of the Federal Rules of Criminal Procedure, would be required to have positive affidavits before authorizing such a search.

5. Whether the decision by this Court in the case of United States versus Rabinowitz, 339 U. S. 56 stating that: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable," eliminates the necessity of a search warrant in all cases where probable cause for the search exists, or whether the decision in that case is applicable only in cases where the search is made incidental to a lawful arrest.

STATEMENT OF THE CASE

Petitioner was indicted on four counts for violating the Internal Revenue laws of the United States relating to liquor in the United States District Court for the Northern District of Georgia, Gainesville Division (R. 1 and 2). Prior to the trial of the case on its merits petitioner filed a written motion to suppress certain evidence (R. 3) on the ground that said articles were unlawfully and illegally seized from his residence by federal officers without lawful warrant or authority and without the consent of the movant. This issue was tried by the court, and upon the hearing evidence was introduced by petitioner and found to be true by the court that five officers raided the home of petitioner (R. 50 and 54) at night without a nighttime search warrant and found therein a distillery consisting in part of an upright boiler with a blower burner and 2400 gallons of mash with hose pipes and a small quantity of non-tax paid liquor (R. 54).

From the findings of fact made by the trial judge it appears that the federal officers had the premises in question under surveillance for two or three days. During this constant surveillance they were able to ascertain and assert a belief under oath that there was an illicit distillery located in the home of Roy Jones (R. 53). During the day of May 2nd one of the officers appeared before the U. S. Commissioner in Gainesville, and made affidavit stating on information and belief that there was an illicit distillery on the premises (Mov. Ex. 2, R. 5 and 51). Upon this affidavit, the Commissioner issued a daylight search warrant (Mov. Ex. 1, R. 4 and 51).

The trial judge found that although the officers had ample opportunity to execute their daylight search warrant during the daylight hours they did not do so but "desiring to seize any vehicles engaged in removing the illicit liquors they did not immediately execute the daylight search warrant * * * * but remained on watch until after dark and until about 9:00 o'clock P.M." (R. 53).

At that time the officers attempted to gain entrance into the dwelling of Roy Jones who was not at home at that time. Mrs. Jones attempted to block the doorway requesting the officers to wait until her husband arrived (R. 8). A twelve year old son of the appellant obtained a shotgun and held it in a threatening manner, in an attempt to keep the officers from searching the premises (R. 37, 38). Mrs. Jones asked the officer if he had a search warrant and he stated that he did not need one (R. 38). They then searched the house and seized the contraband articles.*

Five officers were present at the time of the raid, and there were only two or three doors to the dwelling and it would have been possible for the officers to watch each of the doors and still send another officer for a night-

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* Inasmuch as petitioner believed that the findings of fact by the trial judge were sufficient to show all the pertinent facts we omitted all the evidence from the printing of the record in this court. The Solicitor General designated a portion of the evidence to be printed and omitted the testimony of Mrs. Roy Jones, the wife of the petitioner. While we do not insist that the evidence is essential to the issues involved, we have attached a portion of the testimony of Mrs. Roy Jones as it appears in the original record from the U. S. Court of Appeals for the Fifth Circuit, as on file in this court (see Appendix), in order that this court may have the opportunity of reading the evidence of the methods used by the officers to gain entrance into the home of Roy Jones. While the methods used by the officers are not technically a legal ground for the suppression of the evidence, they serve to illustrate the viciousness of the raid.

time search warrant had the officers even deemed this to be necessary (R. 54).

The trial court concluded that the federal officers had "probable cause for the search" at the time the search was made (R. 54) and held that the search "was not unreasonable and did not violate the Fourth Amendment" due to the existence of their probable cause "even though the officers had time to obtain a nighttime search warrant." (R. 55.)

The trial judge, in so holding, relied upon and cited United States versus Rabinowitz, 339 U. S. 56. The motion to suppress was then overruled and denied and the United States Court of Appeals for the Fifth Circuit affirmed this ruling holding that "the findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress." (R. 59.) A petition for rehearing was filed by petitioner (R. 64) within the time prescribed by the rules, and denied by the Court of Appeals (R. 68).

ARGUMENT AND CITATION OF AUTHORITY

Petitioner has presented elsewhere in this brief five (5) questions for review in this case. While all five of these questions fall within the general question presented we will attempt to classify them as succinctly as possible.

(1 and 2) Practicability of Procuring Warrant

No question of fact arises in this case as to the practicability of procuring a search warrant to search the home of the petitioner. The trial judge determined in his findings of fact that there were a sufficient number of officers present to guard the doors of the house while

another officer could have sought a magistrate to procure a proper warrant. Although the trial judge recognized that it was practicable for the officers to procure a night-time search warrant, he did not believe the element of practicability to be necessary in order to sustain the validity of a search and seizure of a person's home at night or the invasion of his privacy. In so holding the trial judge relied upon the case of

> *United States v. Rabinowitz,*
> 339 U. S. 56, at page 66

holding that "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Petitioner respectfully submits that this court did not, in the Rabinowitz case, supra, eliminate practicability as one of the considerations tending to show unreasonableness of a search. The Rabinowitz case, supra, involved the validity of the search of a person's room *as an incident to a lawful arrest upon a valid warrant of arrest.*

In Trupiano v. United States, 334 U. S. 699, (68 S. Ct. 1229,) this court held:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants *wherever reasonably practicable.*"

In the Rabinowitz case, supra, this court said:

> "To the extent that Trupiano v. United States requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest,* that case is overruled."

It can be seen that the Rabinowitz case does not completely overrule the Trupiano case, but does so only in cases where the search was made *"after a lawful arrest."* No such question is involved in the case at bar.

The Rabinowitz case, supra, involved an arrest upon a valid warrant. This court, on this point, held:

> "Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest."

The search in this case was not dependent initially on a valid arrest. The rule as stated by this court in Trupiano, supra, was not changed in any way by Rabinowitz, supra, except only insofar as it may have applied to those cases where searches were made *incidental to valid arrests upon valid warrants of arrest.*

In the case of Johnson v. United States, 333 U. S. 10, (68 S. Ct. 367,) where evidence of opium was suppressed because of entry into the hotel room of defendant without a warrant, but based on probable cause, it was held:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.
>
> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay

necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.

"But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

This court later, in the case of United States versus Jeffers, 342 U. S. 48, (72 S. Ct. 93,) recognized the rule laid down in the Trupiano case, supra, to be applicable to the facts of that case where the search was made *not as an incident to a valid arrest.* The court said:

"Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341; Agnello v. United States, 1925, 269 U. S. 20, 46 S. Ct. 4. Only where incident to a valid arrest, United States versus Rabinowitz, 1950, 339 U. S. 56, 70 S. Ct. 430, or in 'exceptional circumstances,' Johnson v. United States, 1948, 333 U. S. 10, 68 S. Ct. 367, may an exemption lie, and then the burden is on those seeking the exemption to show the need for it.

McDonald v. United States, 1948, 335 U. S. 451, 456, 69 S. Ct. 191."

The Jeffers case, supra, being the latest decision of this Court upon the subject, recognizes it as the rule that a search warrant is necessary to sustain the validity of a search, and that but two exceptions are known, to-wit: (a) incident to a valid arrest, and (b) in exceptional circumstances. The case at bar does not fall into either of the two stated exceptions. The trial court and the Court of Appeals in the case at bar uphold the Rabinowitz case, supra, as the *rule* instead of one of the known *exceptions* to the rule.

The facts in the case at bar resemble very strongly those of Taylor v. United States, 286 U. S. 1, (52 S. Ct. 466) wherein this court entered a reversal of the judgment based on a search and seizure without warrant during the night.

(3) Probable Cause Determinable by Judicial Officer

Facts showing probable cause for the search of a dwelling can never supply the necessary ingredient of a valid search warrant in cases where none of the known exceptions are present. The language of the Fourth Amendment is that "*no Warrants shall issue, but upon probable cause;*" not that *no searches or seizures may be made, but upon probable cause.* This portion of the Amendment does not measure the standard or fix the weight of the evidence by which searches may be conducted without warrants; it prescribes the duty and limits the power of the judicial officer vested with the authority to issue the warrant.

In the case of Agnello v. United States, 269 U. S. 20, (46 S. Ct. 4,) it was held:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See Entick v. Carrington, 19 Howard's State Trials, 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*" (Italics added.)

The rule requiring search warrants where they can be obtained practicably is a sound one, and necessary to retain our freedom under our Constitution. In United States versus Lefkowitz, 285 U. S. 452, (52 S. Ct. 420,) it was held:

> "Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

(4) Mere Probable Cause Not Sufficient to Authorize Nighttime Search

Rule 41 (c) seems clear and unambiguous as to the duties of federal judicial officers relative to the issuance of search warrants. The mandate of the rule is that "The

warrant shall direct that it be served in the daytime," and the only exception is to the effect that "*if the affidavits are positive* that the property is on the person or in the place to be searched," then the magistrate *may* direct "that it be served at any time."

In the case at bar the officers had complied with this rule and a U. S. Commissioner in Gainesville had issued the warrant authorizing them to search the premises in question "*during the daylight hours.*" In order to have authorized the search at the time during which the officers were proceeding a federal judicial officer would have been required to have before him *positive affidavits* that the property was in the place to be searched. Without it, the entire judicial authority of the United States government would have been powerless to have authorized such a search.

Did these officers have *positive evidence* such as would have authorized a magistrate to issue a search warrant directing that it be executed during the night season? The trial judge found that "the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the *belief* that Roy Jones was guilty of the offense of operating an illicit distillery in his home." (R. 55.) We respectfully submit to this court that such facts as these, under Rule 41 (c), would not have been sufficient in themselves to have authorized a federal judicial officer to issue a warrant directing a search at night. We further respectfully submit to this court that law enforcement officers have never had greater power conferred upon themselves than judicial officers.

The raising of this issue in this certiorari serves to illustrate that had one of the officers attempted to procure a search warrant before making the raid on petitioner's home, he would have discovered that, under federal law, a search warrant directing a nighttime search would undoubtedly have been refused. If the agents then determined to make the search and seizure without the benefit of such warrant the seizure would have been unquestionably illegal.

To hold in this case that law enforcement officers have the right to conduct a search of a person's home at night without a proper warrant founded on positive affidavits would mean that United States Commissioners are without authority to issue search warrants directing officers to search dwelling houses at night based on mere probable cause, but the mere enforcement officer may do so without such a warrant or authority. This would lead to an ultimate and utter destruction of the true meaning and intent of the Fourth Amendment and Rule 41 (c).

(5) Probable Cause Does Not Eliminate Necessity of Search Warrant

The trial judge in the case at bar held:

> "If the officer has no warrant he must show probable cause."

If this is the law search warrants are no longer necessary in any case, and the Fourth Amendment is reduced to a mere scrap of paper. Rule 41 (c) requires as a condition precedent to the issuance of a valid search warrant that there must be (1) sworn evi-

dence of probable cause to authorize a warrant to be issued directing a daylight search, or (2) sworn evidence of positive facts to authorize a warrant to be issued directing a nighttime search.

This inevitably means that probable cause is at least a necessary element before a magistrate may act, therefore an officer must have at least probable cause in order to procure a valid warrant. However, according to the trial judge's ruling in this case such officer could dispense with the necessity of a warrant so long as he had probable cause to conduct the search without one.

Consequently no search warrant would be necessary at all. In other words, probable cause is a condition precedent to a valid search warrant, but where the condition precedent is in existence no warrant would be necessary. This undoubtedly can not be the law, because if it were it would bring about the complete and utter destruction of the need for impartial magistrates to protect persons from unlawful searches and seizures by zealous law enforcement officers who would be empowered to act on their own discretion.

CONCLUSION

Here was a raid by five agents representing the power and majesty of the combined efforts of both the United States government and the State of Georgia against an illiterate and defenseless woman and her twelve year old son, trying to protect their home until the husband and father returned; a raid that would do justice to a police state in the hey-day of its reign. Were it not for the fact that a violation of federal law was later discovered by

these agents as a result of their unlawful acts and a prosecution instituted against the head of the house, this greater and most serious breach of humanity and constitutional rights would have undoubtedly gone unnoticed by the courts; for it is not the innocent victims of unreasonable and unlawful searches who eventually bring such wrongs to light, but those against whom the agents of the government achieve their greatest success; and so, in order to protect the innocent from this same type of deprivation of constitutional privilege and immunity it becomes essential to free the petty law violator in order to place the stamp of disapproval on the lawless acts of the men whose duty it is to uphold the constitution and enforce the laws of this land.

Petitioner in certiorari contends that the judgment of the United States District Court for the Northern District of Georgia overruling and denying the motion to suppress the evidence was erroneous, and that such error was so substantial as to render all further proceedings nugatory. Petitioner in certiorari also contends that the United States Court of Appeals for the Fifth Circuit, in affirming the District Court per curiam, committed reversible error.

Inas. uch as the trial court took into consideration, in arriving at a guilty verdict, the illegally obtained evidence against petitioner, (R. 56.) he is entitled to a new trial in order that he may be tried only upon whatever evidence was lawfully obtained against him.

The judgment of the United States Court of Appeals for the Fifth Circuit in this case should be reversed

with direction to the United States District Court for the Northern District of Georgia to vacate the judgment of conviction and sustain the motion to suppress the evidence complained of by petitioner in his motion to suppress.

Respectfully submitted,

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February, 1958.

APPENDIX

(Folio 24)

MRS. ROY JONES, having been sworn, testified as follows:

Direct Examination.

By Mr. Asinof:

Q. State your full name, please, ma'am?

A. Katie Lee Jones.

(Folio 25)

Q. Katie Lee Jones. You the wife of Roy Jones?

A. Yes, sir.

Q. Were you present—were you living with your husband on May 2 of this year?

A. Yes, sir.

Q. State to the Court what happened on the night of May 2, anything unusual that happened around your home?

A. Well, we had been to Dawsonville to carry our kids to a play down there.

Q. Who is "we"?

A. Me and my sister, and both of our kids, her kids and mine.

Q. I see. All right.

A. And we drove, when we come back we drove up in the yard, and—

Q. That is the yard of your home?

A. Of my home, yes. So one of them jerked the car door open and said, "Git out of there." I says, "We ain't got nothing in here but kids."

Q. You say "one of them." Who are you speaking about?

A. Well, one of them law, they said they was law.

Q. One of the officers?

A. Yes, I don't know which one.

Q. All right.

A. So when he done that, I jumped out on the other side, so I reckon we both got to the door about the same time, and I said, "Don't come in here," and he says, "I'm coming in." I says, "You ain't coming in here," I says, "You can wait until Roy gets here." He said, "I ain't waiting," he says, so I kept pushing him back, and they kept slinging me against the side of the wall, and I come back and I kept pushing and he would keep slinging.

(Folio 26)

Q. When did you learn that they were officers?

A. Well, I wouldn't say just how long, but it was a good little bit, until Woody come up—he said he was Woody—he said, "I'm federal law," I said, "If you're federal law, let's see your warrant," he said, "I don't need a warrant," and I asked him to wait until Roy come.

Q. What did he say?

A. He says, "We don't wait," so he kept pushing and I kept pushing back, and they'd sling me first one way and the other, but then I'd come back on them and there's one of them, that little old, I don't know which one he was, a little short one, he told my little boy, says, "You stand back or I'll slap your brains out," and I says, "You won't put your hands on my kid."

Q. How old is that little boy?

A. Well, he was twelve at that time. I says, "You won't put your hands on my kid." He says, "I'll slap his damn brains out,"—and they was another one there,—he said to that other one, says, "Here, put these handcuffs on her." He slapped my hands behind me and got one of the handcuffs on me, and Woody come up and says, "You take the handcuffs off of her," so he took the handcuffs off of me.

Q. Do you remember which officer it was that put the handcuffs on you?

A. Yes, I do.

Q. Can you point him out? Is he in the courtroom?

A. That one right over there.

Q. On the—

A. And he told that other one, says, "Throw her down in the floor and put your foot on her," that one right there did.

(Folio 30)

Q. And they didn't do anything to you except to go past you and get into the house?

A. No, they, I was at the door and they pushed me against the side of the door, and I runned in front of them again, and they would push me back up against the wall, and I'd come back, and I'd push at them again, and when they'd put their feet and skinned—well, they had skint my feet all over, a-kicking, I reckon, or stomping as I was pushing them backwards—

Q. Every time they attempted to come into the house, you jumped back and tried to push them out?

A. I'd get in front.

Q. And if you hadn't done that, they wouldn't have had to push you any place?

A. No, if I hadn't of got in front of them—I was asking them to wait until Roy got there.

Q. Did you shout to the people in the truck that was stuck in the driveway, to turn out their lights?

A. No, sir, I didn't.

IN THE

Supreme Court of the United States

October Term, 1957

No. 331

ROY JONES, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In response to the petition for certiorari and in the brief filed on behalf of the government in this court the contention is made for the first time that the seizure of the contraband by the Alcohol Tax Unit Agents was legal because they entered the home of the petitioner without lawful warrant in order to arrest him on probable cause to believe that he had committed a felony.

The record in this court, consisting of the transcript of the testimony of the witnesses on the hearing of the motion to suppress before the district judge, the findings of fact and conclusions of law, and the opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court, are completely devoid of any testimony, contention or finding that the entry by the agents of the government into the home of the petitioner was for any reason other than to search his home for contraband in the belief that the agents had the authority to do so without a search warrant on the theory that, having probable cause to believe that an unlawful distillery was in operation, they did not need a search warrant even though they had ample opportunity and time to procure one. It is our understanding that the district judge upheld the validity of the search and seizure, and the circuit court affirmed, upon the theory that the federal agents had probable cause to believe that a felony was being committed inside the home of Roy Jones, and that, based on *United States v. Rabinowitz*, 339 U. S. 56, no search warrant was necessary if the agents had probable or reasonable cause to make the search and seizure without a warrant.[1]

The government, in its brief, does not contend that an entry may be made merely to search in the belief that offending articles are inside a building.[2] They now contend for the first time in this court that the evidence was admissible because the agents entered the home for the purpose of arresting petitioner without a warrant of arrest or to search on probable cause to believe that

1. See Rec. pp. 51, 55.

2. Brief of U. S. p. 10.

he had committed a felony. The contention now made by the government is without merit for three reasons.

First: The record fails to indicate that the federal agents making the search and seizure were acting with any such purpose in mind or that the district judge or the court of appeals so construed their acts.[3]

Second: The evidence clearly illustrates that the federal agents had ample opportunity to procure a warrant of arrest for petitioner at the time they obtained the daylight search warrant inasmuch as the probable cause for believing that he had committed a felony existed at the time they obtained the warrant to search his home.

Third: Although Alcohol Tax Unit agents have statutory authority to arrest persons whom they have probable cause to believe have committed a felony, Congress never has, and it is doubtful if they have the constitutional authority to, authorize the invasion of a home in order to make such an arrest.

FIRST: Record fails to indicate purpose of entry was to arrest.

None of the federal agents testified that they believed the petitioner was at home at the time they entered the house without a warrant. No witness claimed that Roy Jones was seen going in the house prior to the entry by the agents; nor did any of the agents ever testify that they entered the house for the purpose of finding and arresting the petitioner. On the contrary, Special Agent Langford was asked several times during his testimony what his purpose was in entering the house.[4] His reply

3. Rec. pp. 59, 63.

4. Rec. 46, 47.

on one occasion was that he was investigating. He had also appeared before the Commissioner in Gainesville that day to obtain a search warrant to search the premises and that was clearly the purpose in going back to the petitioner's home. (Rec. 4, 5.)

SECOND: There was ample opportunity to secure arrest warrant.

The government, in their brief, lays much emphasis on the theory that federal agents, having the power to arrest without warrant on reasonable cause to believe that a felony has been committed, may violate the privacy of a man's home at any time of day or night, without the aid or interposition of a detached magistrate, on a bare claim that at some time in the past the agent had reasonable cause to suspect that the occupant had committed a felony. Such a theory, if put into actual practice would reduce the fourth amendment to mere form of words without substance or meaning.

It is to be noticed, however, that the government in its brief fails to cite any cases from this court or any of the courts of appeals holding an arrest without warrant, but based on probable cause, to be legal where it is practicable for the arresting officer to procure a warrant of arrest and he offers no valid reason for his failure to do so. Warrants of arrest and warrants to search stand on similar footings. To procure either requires probable cause, supported by oath or affirmation. A warrant of arrest, when served on the defendant named therein authorizes a reasonable search of his person and the property under his immediate control as an incident thereto.[5] Likewise, a warrant to search, when properly

5. U. S. v. Rabinowitz, 339 U. S. 56.

executed and evidence of crime discovered, authorizes an arrest of the person found to be violating the law. A search of a home without warrant can only be legally made under exceptional circumstances or incidental to a lawful arrest on a valid warrant of arrest,[6] or where there is not enough time to procure a warrant. A valid arrest without warrant can only be lawfully made incidental to a valid search on a lawful warrant to search or under exceptional circumstances where for lack of a warrant there would be a failure of justice or the defendant is actually attempting to escape.

Judge Learned Hand, of the United States Court of Appeals for the Second Circuit, in writing the opinion for that Court in a case involving a search and seizure incident to an arrest without warrant, in the case of

UNITED STATES V. COPLON,
185 Fed. 2nd, 629, held:

> "The statute certainly requires a warrant when there is time to obtain one; the dispensation is limited to occasions when it is not safe to wait. The only excuse that is suggested is that Gubitchev might have made off with the papers, and to it there are two answers. First, the condition is not that evidence shall be likely to escape, but that the person to be arrested shall be. Second, if a warrant had been obtained, the incriminating papers could as well have been seized. We have no alternative but to hold that the arrest was invalid, and concededly that made the packet incompetent against her."

Other U. S. Circuit Court of Appeals rulings have recognized that arrests without warrant, based on reasonable

6. U. S. v. Jeffers, 342 U. S. 48.

cause, become unreasonable with the lapse of time after the probable cause first becomes apparent.[7]

In the brief filed by the government it is unequivocally stated that

> "The law is clear that an officer having lawful authority to arrest without a warrant may do so even though he had previously had sufficient information and time to get a warrant. United States v. Rabinowitz, 339 U. S. 56, 66."

We respectfully submit that such is not a correct interpretation of the Rabinowitz case, supra, inasmuch as the ruling in that case was based upon a search incidental to an arrest *upon a valid warrant of arrest* and not upon an arrest "without a warrant" as stated in the government's brief.[8]

THIRD: Right to arrest without warrant not authorize invasion of home.

The brief for the government also fails to cite any cases on the proposition that a federal agent, having the power to arrest on reasonable cause to believe that a felony has been committed, but not having a warrant of arrest, would be empowered to invade the privacy of a home in order to effect such an arrest.

A federal agent, having the authority to arrest for violating the liquor laws, maintains the lawful right to enter a home *to execute a valid warrant of arrest* where he has probable cause for believing the wanted person to be inside the house, but the law does not

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7. Poldo v. U. S. (9th Cir.) 55 Fed. 2nd, 866.
Hobson v. U. S. (8th Cir.) 226 Fed. 2nd, 890.

8. Brief of U. S., p. 9 and p. 18.

permit an entry into a house to arrest *without a warrant* of arrest or to search. While the federal statutes cited by the government in their brief are sufficient to authorize federal agents to make arrests without warrant in specified cases, the statutes do not authorize the invasion of a home in order to effect the arrest, and in such cases the constitutional protection afforded an individual

> "to be secure in their persons, houses, papers and effects, against unreasonable searches and *seizures*, shall not be violated."[9]

Furthermore, the protection afforded by the Fourth Amendment is not restricted to *search* warrants, inasmuch as the word *search* does not appear in the Amendment. It further provides that

> "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized."

The word "persons" as appears in the Amendment evidences an apparent intention by the framers of the Constitution to afford the entire protection of the Amendment to extend to all types of searches, both for *property* on ordinary search warrants and for *persons* on ordinary arrest warrants.

It would therefore be incongruous, to say the least, that enforcement officers should be prohibited from making a search for *property* in a house without first securing a proper and valid warrant, and under the same circumstances would not be prohibited from making a search for a *person* in a house without a warrant.

---

9. Fourth Amendment, U. S. Constitution.

The government attempts to justify the seizure by the lawfulness of the search, and to justify the lawfulness of the search by the validity of the arrest; *an arrest which admittedly could only have been justified by the lawfulness of the search.* They therefore seek to justify *one unlawful act by committing two* and contending the right to a third.

SEIZURE NOT INCIDENTAL TO ARREST

A seizure of property, to be within the framework of the Fourth Amendment, must be reasonable and lawful. When founded upon a valid warrant its lawfulness is presumed; where not founded upon a valid warrant its unlawfulness is presumed, and the burden is cast on the party claiming its lawfulness to prove it and to thus rebut the presumption.

Only two exceptions have been recognized to render a seizure of property without a search warrant valid, to-wit: (1) incidental to a valid arrest and (2) in exceptional circumstances. One of the main exceptions to a seizure without warrant is where the seizure is incidental to a lawful arrest. Where the arrest is actually made upon a valid warrant of arrest, and the seizure is shown to be incidental thereto such seizure is prima facie lawful; where the arrest is actually made without a valid warrant of arrest the lawfulness of the arrest on some legal ground must be proved before the seizure can be held valid. In neither of these instances, however, can it be contended that a seizure made incidental to a valid arrest is, in any sense, lawful where the basis of the seizure, i.e. the lawful arrest, has never actually been consummated but merely

that the agent making the seizure had *intended* to make an arrest.

Probable cause to believe that a felony has been committed may authorize a federal agent to make a valid arrest without a warrant, and, as an incident to such an arrest the agent may seize property under the control of the arrested person; however, in such instance the seizure of the property is made to depend initially on the *fact of the arrest,* and not the *right to make the arrest* because of the probable cause.

In other words, *having probable cause* to believe that a felony has been committed may authorize the agent to *make* the arrest, and the fact of *having made the arrest* in turn may further authorize the agent to seize the property, but where the arrest is never in fact consummated there is no valid basis in law to justify the seizure. In such event the seizure would, in reality, have been dependent on the probable cause and not the arrest, and, where dependent on the probable cause the practicability of procuring a search warrant becomes an issue.

CONCLUSION

The contention made by the government that the seizure of the contraband was made after a search of the petitioner's home incident to their attempting to arrest him on probable cause to believe that he had committed a felony, when they had ample opportunity to procure a valid warrant of arrest and offered no excuse in failing to do so, are without merit and the judgment

of the Court of Appeals affirming the District Court should be reversed.

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March, 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 331

ROY JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 112–118) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1957 (R. 119), and a petition for rehearing was denied on July 3, 1957 (R. 125). The petition for a writ of certiorari was filed on July 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the search and seizure was reasonable.

STATEMENT

A four-count indictment filed in the District Court for the Northern District of Georgia charged petitioner and two other defendants with violating the laws relating to liquor (R. 1–2). The petitioner was tried by the court without a jury (R. 95, 101) and found guilty as charged (R. 102). He was sentenced to three years imprisonment, plus a $100 fine on the first count, and fined $500 on the second count (R. 103–104). On appeal, the conviction was affirmed (R. 112–118).

1. On April 30, 1956, having received information that petitioner was operating an illegal distillery in his farm house near Dawsonville, Georgia (R. 32, 45, 48), federal agents went to the farm to investigate (R. 45, 75). In a hollow behind petitioner's house, agents found spent mash—which has a characteristic appearance—running out of a rubber hose into a stream (R. 39, 75, 76). There is no known way to produce spent mash except by distilling the alcohol out of mash (R. 76). The officers traced the partially buried hose to within 57–75 yards of petitioner's house—as far as they dared go without risk of being seen (R. 39, 48, 75, 79). The hose led toward petitioner's residence (R. 75).

Four federal agents and one state officer returned to the vicinity of petitioner's house the following day. The hose was still in place and delivering mash into the stream (R. 40–41). The agents kept watch until the early morning hours of May 2, 1956 (R. 42). They could hear voices and the sound of a blower burner operating in the house, and smelled mash cooking

(R. 42, 55, 64–65, 76–77). Heat is used during the course of distilling alcohol out of mash (R. 80), and blower burners are quite commonly used as a source of heat in the operation of illegal distilleries in Dawson County, Georgia. Blower burners are not commonly used for any other purpose in that area (R. 44).

On May 2, 1956, agent Langford obtained a daytime search warrant for petitioner's house (R. 5–7). The group of investigators then returned to the vicinity of the house, arriving there in the late afternoon about a half hour before dark (R. 60, 66, 77). It began to rain heavily and the agents decided to make further observations rather than execute the warrant at that time (R. 82–83). While concealed in a wooded area across the road from the house (R. 59, 77), they heard someone at petitioner's residence say, "Do you want to bring the truck?". Then someone left the yard and walked up the road toward the home of petitioner's father and brother, located about ¼ mile away (R. 18, 70, 77). Later, a truck drove into petitioner's yard and around to the back of the house, out of the agents' sight (R. 55, 77). At about 9:15 p. m., after the sound of heavy objects being moved had emanated from the rear, the truck was driven around the end of the house. It became stuck in petitioner's driveway as the driver attempted to pull onto the public road in front of the house (R. 56, 70–71). At this point the agents arrested the two men in the truck, and found that it was loaded with over 400 gallons of untaxed liquor (R. 42–43, 56–57, 78).

A car driven by petitioner's wife drove into petitioner's yard through a second driveway just as the

agents moved across the road (R. 25, 56, 65, 78). When the agents moved onto the porch of the house, they found petitioner's 13 year-old son, who had obtained a shotgun and was holding it at port arms (R. 65). The boy ran through the house from front to back (R. 65). By this time the agents had the house surrounded (R. 57, 72, 78). The boy returned to the front of the house, remaining in the hall (R. 30, 65). Meanwhile, Mrs. Jones had taken up a position blocking the door (R. 57) and refused to tell her son to put down the shotgun (R. 65). After a moment or two of conversation, state agent Hollingsworth succeeded in edging close enough to the boy to jump inside and seize the weapon (R. 66). The agents then went inside the house, where they found petitioner's father, Frank Jones, and his brother, Millard Jones (R. 18). The agents also found untaxed liquor, a large illegal distillery, and numerous vats and drums used in connection with the distillery (R. 57, 72, 78–79). Petitioner arrived home at about 10:00 p. m. (R. 32). He claimed ownership of the distillery (R. 35).

2. On October 8, 1956, petitioner moved to suppress as evidence and have returned to him the boiler, burner, and 15 barrels seized by the agents in his home (R. 4). The district court heard extensive testimony and then denied the motion, holding that the agents had probable cause to conduct a search without a warrant (R. 95–101). The Court of Appeals affirmed *per curiam*, attaching the district court's ruling as an appendix to its opinion.

We do not read the opinion of the district court, on which the Court of Appeals affirmed, as justifying the search merely on the basis of probable cause to believe that there was an illegal still in the house which would serve as evidence of a charge to be later brought. Such a ruling would be contrary to the holding of this Court in *Taylor* v. *United States*, 286 U. S. 1; see also *Agnello* v. *United States*, 269 U. S. 20, 33. the facts of this case bring it within the exception suggested by *Taylor, supra*, that an entry without a warrant is justified in order to make an arrest.

In this case, the agents had probable cause to believe that there were persons then in the house in the process of engaging in illegal operations in alcohol.[1] After arresting the men in the truck, it was observed that the truck tracks led around to the back door of the house and were the only tracks to be seen (R. 72). The agents had seen several persons moving around in the house before they moved in (R. 77–78), and the hose carrying spent mash into the stream was still in place (R. 71). The large quantity of alcohol on the truck (over 400 gallons in 68 cases (R. 43, 57)) suggested that more than two men may have been required to load it. The agents were, therefore, justified in entering the house to arrest participants in the distillery operation. *Ellison* v. *United States*, 206 F. 2d 476, 479 (C. A. D. C.); *Martin* v. *United States*, 183 F. 2d 436, 439 (C. A. 4), certiorari denied, 340 U. S.

[1] There is no dispute about the presence of probable cause to make an arrest, which distinguishes this case from *Miller* v. *United States*, No. 126, certiorari granted, 353 U. S. 957, where probable cause is an issue.

957; *United States* v. *Dean*, 50 F. 2d 905 (D. C. Mass.). As it turned out, the agent did not find petitioner, whose arrest was contemplated, but they did find his father and brother. Although these men were not arrested at the time,[2] this does not detract from the fact that the agents had reasonable cause to believe that someone in the house at the time they made the entry was then in the process of committing a felony. The entry was therefore legal, and the agents could properly seize the distillery and other items of contraband subject to forfeiture. *United States* v. *Rabinowitz*, 339 U. S. 56, 60.[3]

---

[2] The record is silent as to whether or not Frank and Millard Jones were arrested. We have ascertained, however, that no arrests were made in the house.

[3] United States Marshals have the power to make arrests without warrant on reasonable grounds to believe that a felony has been or is being committed. 18 U. S. C. 3053. It is believed that 26 U. S. C. 5313 conferring upon the Secretary of the Treasury, or his agents, the rights, privileges, etc., which are conferred by law for the enforcement of any laws in respect of the "* * * use of, or traffic in, intoxicating liquors", confers upon the agents the powers of marshals. This has been held in *United States* v. *Dalson*, 288 Fed. 199, 203 (E. D. Mich.), at a time when former 18 U. S. C. (1946 ed.) 593 specifically referred to such powers of marshals in relation to liquor offenses, and in *United States* v. *Jones*, 204 F. 2d 745, 753 (C. A. 7), certiorari denied, 343 U. S. 854, with regard to narcotics. See also *Trupiano* v. *United States*, 334 U. S. 699, and *Scher* v. *United States*, 305 U. S. 251, where the Court assumed that Treasury agents had such power.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 331

ROY JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 59–63) is reported at 245 F. 2d 32.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1957 (R. 64), and a petition for rehearing was denied on July 3, 1957 (R. 68). The petition for a writ of certiorari was filed on July 31, 1957, and granted on October 14, 1957 (R. 70; 355 U. S. 810). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the seizure of contraband was reasonable where federal agents, having probable cause to arrest

petitioner and reasonably believing that he was inside his house, entered and found contraband in plain view.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment and the statutes involved are set out in the Appendix, *infra*, pp. 25–31.

STATEMENT

A four-count indictment filed in the District Court for the Northern District of Georgia charged petitioner and two other defendants with violating the laws relating to liquor (R. 1–2). The petitioner was tried by the court without a jury (R. 55) and found guilty as charged (R. 56). He was sentenced to three years imprisonment, plus a $100 fine on the first count, and fined $500 on the second count (R. 57). On appeal, the conviction was affirmed (R. 59–63).

1. On April 30, 1956, having received information that petitioner was operating an illegal distillery in his farm house near Dawsonville, Georgia (R. 12, 22), federal alcohol agents went to the farm to investigate (R. 22, 41). In a hollow behind petitioner's house, an agent found spent mash—which has a characteristic appearance—running out of a rubber hose into a stream (R. 17, 24, 41–42). One of agents testified he knew of no way to produce spent mash except by distilling the alcohol out of mash (R. 43). The officer traced the partially buried hose to within about 50 yards of petitioner's house—as far as he dared go without risk of being seen (R. 17–18, 24).

Four federal agents and one state officer returned to the vicinity of petitioner's house the following day

(May 1). The hose was still in place and delivering mash into the stream (R. 18–19, 42, 45). It led toward petitioner's house and there were no other houses near the hose (R. 19). The agents kept watch until the early morning hours of May 2, 1956 (R. 20, 43). They could hear voices and the sound of a blower burner operating in the house, and smelled mash cooking. Occasionally people could be seen moving around inside the house (R. 20, 29, 37, 43). Heat is used during the course of distilling alcohol out of mash (R. 45), and blower burners are quite commonly used as a source of heat in the operation of illegal distilleries in Dawson County, Georgia. Blower burners are not commonly used for any other purpose in that area (R. 21).

On May 2, 1956, federal agent Langford obtained a daytime search warrant for petitioner's house (R. 4–5). The group of investigators then returned to the vicinity of the house, arriving there in the late afternoon about a half hour before dark (R. 33, 38, 43). They decided to make further observations and learn whether other parties were involved and whether any vehicles were being used, rather than execute the warrant at that time (R. 47–48). While concealed in a wooded area across the road from the house (R. 32–33, 29), they heard someone at petitioner's residence say, "Do you want to bring the truck?" (R. 44). Then a person left the yard and walked up the road toward the home of petitioner's father and brother, located a short distance away (R. 7, 43–44). Soon a truck was driven into petitioner's yard and around to the back of the house, out of the agents' sight (R. 29,

44). Sometime later, through the window, the agents saw people moving about in the house and heard noises as though heavy pieces of equipment were being moved (R. 20, 30, 44).

At about 9:15 p. m., the truck was driven around from the rear of the house and the agents started to close in (R. 20, 30, 44). As the truck attempted to pull onto the public road in front of petitioner's house, it became stuck in the driveway (R. 30, 44). Federal agent Evans climbed into the cab of the truck and arrested James McKinney, the driver (R. 30). Grady Jones, who was on the back of the truck, was arrested by federal agent Blizzard (R. 11, 14, 20, 30). It turned out that 413 gallons of nontaxpaid liquor was loaded on the truck (R. 21, 30, 62). Meanwhile, state revenue agent Hollingsworth went to the front porch, where he found petitioner's wife and twelve-year-old son,[1] and federal agent Langford, followed by Evans, went to the rear door (R. 37, 44, 54). The boy picked up a shotgun and started through the house from front to back. Hollingsworth called out a warning to Langford and Evans, and asked Mrs. Jones to "Make the boy put the gun down." She refused. The boy returned to the front of the house, and Langford joined the group on the porch. Hollingsworth repeatedly asked the boy to hand over the gun, but without success. After a few minutes, the boy came close enough so that Hollingsworth, who had been standing

[1] As the agents advanced on the truck, a car coming from the direction of Dawsonville, Georgia, had driven into petitioner's yard through a second driveway. Mrs. Roy Jones arrived at the porch a step or two ahead of Hollingsworth (R. 8, 30, 37).

in the doorway, "could get to the gun" and disarm the boy (R. 37–38, 44).[2]

Agents Langford and Evans entered the house through the front door over the protests of Mrs. Jones (R. 31, 44).[3] They found petitioner's father, Frank Jones, and his brother, Millard Jones, but did not find petitioner, in the house (R. 7–8, 10).[4] They also discovered, in one of the rear rooms, an upright boiler, an electric motor with a blower attached, and several fifty-five gallon metal drums (R. 31, 44). A stairway led up into the attic from this room. Langford went up the stairs to the attic and observed a still, wood barrels filled with mash, metal tank type fermenters, a slop barrel, and a mash pump (R. 15, 44–45). Then Langford went back downstairs, asked Mrs. Jones to calm down, and took up the wait for petitioner (R. 44–45).

[2] The district court found as a fact that "the first entry into the residence was made by state agent Hollingsworth to secure the shotgun and take it away from the child" (R. 62).

[3] Frank Jones, petitioner's father, testified that Mrs. Roy Jones attempted to bar entry to the house, asked to be shown a warrant, and asked the agents to wait until petitioner returned home. According to this witness, the officers pushed Mrs. Jones out of their way (R. 8–9). In addition, petitioner includes testimony from Mrs. Jones in the appendix to his brief (pp. 18–21) which is to the same effect. However, the agents denied that they had used force to gain entry (R. 31) except that state agent Hollingsworth may have unintentionally bumped either Mrs. Jones or her son in seizing the shotgun (R. 38).

[4] The record is silent as to whether or not Frank and Millard were arrested. We have ascertained, however, that no arrests were made in the house.

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Petitioner arrived home at about 10:00 p. m. to find Grady Jones and McKinney under arrest and the group of agents waiting for him on the front porch (R. 12–14, 50). He claimed ownership of the distillery but denied that the whiskey found in the truck had come from his still (R. 15–16, 50). After talking to petitioner, the agents pumped out most of the mash and destroyed those parts of the still which they did not take with them (R. 14).

At the time of the entry into the house, agent Langford, who was in charge of the investigation (R. 40), assumed that he had probable cause to arrest anyone emerging from the premises who was known to have violated an internal revenue law. On cross-examination he testified (R. 49):

> Q. You would not have had a right? You would not have had a right, you would not have been able to have arrested anyone coming out of those premises?
>
> A. Had not I known there that they had violated some Internal Revenue law.
>
> Q. In other words, you didn't assume at that time that you even had probable cause?
>
> A. I did assume.
>
> Q. You did assume that?
>
> A. Yes.

He also believed that the agents had sufficient evidence to enter the premises without a search warrant (R. 51).

2. On October 8, 1956, petitioner moved to suppress as evidence and have returned to him the boiler, burner, and about fifteen barrels seized by the agents in his home (R. 3). He did not move to suppress

the mash which was in the barrels (R. 3, 15). After hearing extensive testimony the district court denied the motion, holding that (R. 55):

> * * * the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime search warrant.

The Court of Appeals affirmed *per curiam*, attaching the district court's findings and conclusions as an appendix to its opinion (R. 59–63).

SUMMARY OF ARGUMENT

At no time has the Government claimed that the entry into petitioner's home at about 9:15 p. m. could be justified under the daytime search warrant. Nor have we contended that an entry may be made merely to search in the belief that offending articles are inside a building. Rather, we think the evidence here was admissible because contraband was discovered after a lawful entry for the purpose of arresting petitioner on probable cause to believe that there were in the house persons then engaged in the commission of a felony and that petitioner was among such persons.

A. Agents of the Alcohol Tax Unit of the Internal Revenue Service are peace officers of the United States with power to make arrests for liquor offenses. They have the powers of United States Marshals, including the power under federal law to arrest without

a warrant on probable cause to believe that an offense has been or is being committed.

B. At the time the federal agents entered petitioner's house, they had ample cause to believe that there were persons inside the house who were subject to arrest, and that petitioner was one of them. The agents had made observations over a period of two days prior to the date of entry. They had smelled cooking mash, had seen the discharge of spent mash into a nearby stream from a hose leading from petitioner's house, and had heard the sounds of a distillery operation. They had good cause to, and did, believe that several persons, among them petitioner, were involved in the enterprise.

At the time of the entry, the federal officers had seen and heard enough to know that a large quantity of illicit liquor was being removed from the premises. They had just arrested two persons involved in the removal and knew they had the power to arrest anyone inside the house who was participating in the operation of the still, especially petitioner. They had every reason to believe that there were several persons, including petitioner, inside the house, and that these persons had been alerted to the arrests made outside.

On this basis, it is a fair inference that the agents entered to arrest petitioner, and not to make a search. As it turned out, petitioner was not in the house, and the officers returned to the front porch to await his return after discovering the contraband, but this does not detract from the reasonableness of the belief that

he was inside, entertained by the agents at the time of entry into the house.

An officer having lawful authority to arrest without a warrant may do so even though he had sufficient information and time to get a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 66. He may enter a house, even over protest, to make an arrest where he has probable cause to believe that a felony is being or has been committed and that the perpetrator is within the house. See *Agnello* v. *United States,* 269 U. S. 20; cf. *Taylor* v. *United States,* 286 U. S. 1, 6. Moreover, if there was reasonable cause to believe that a felon was within the house the entry was nonetheless lawful even though the officer's good faith belief later turned out to be erroneous.

C. Having made a lawful entry, the officers were entitled and obligated to seize contraband which was in open view and in which, by statute, petitioner could not have any property interest. This right of seizure did not depend upon the making of a contemporaneous arrest or upon the possession of a valid search warrant. It arose from the fact that the agents saw before them property, the very possession of which is a crime, in a place which they had lawfully entered.

There is no question but that the agents immediately recognized petitioner's still as one which, by law, was contraband and subject to forfeiture. It was located in a dwelling house, an unlawful site for a distillery, and no sign reading "registered distillery" was displayed. This Court has always recognized that where, as here, in the course of his official duties, an officer comes upon property which is contraband or

the instrumentality of a crime, he may seize the property without a warrant. *Harris* v. *United States,* 331 U. S. 145; *Zap* v. *United States,* 328 U. S. 624; *Steele* v. *United States No. 1,* 267 U. S. 498.

ARGUMENT

At no time in this case has it been argued that the entry into petitioner's home, at about 9:15 p. m., could be justified on the basis of the daytime warrant.[5] Nor do we read the opinion of the district court, on which the Court of Appeals affirmed, as justifying the search merely on the basis of a belief that there was an illegal still in the house which would serve as evidence of a charge to be later brought. Such a ruling would be contrary to the holding of this Court in *Taylor* v. *United States,* 286 U. S. 1; see, also, *Agnello* v. *United States,* 269 U. S. 20, 33. Rather, we believe the facts of this case bring it within the exception suggested by *Taylor, supra,* 286 U. S. at 6, and subsequently developed by the lower courts, that an entry without a warrant is justified, under appropriate circumstances, in order to make an arrest or when there is reason to suppose that an arrest can be made.

A. Federal Alcohol Tax Unit agents have the power to arrest without warrant on probable cause to believe that a felony has been committed

Agents of the Alcohol Tax Unit of the Internal Revenue Service are peace officers of the United

[5] Possession of an insufficient warrant does not render illegal an arrest which could lawfully have been made without a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 60; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 356; *Stallings* v. *Splain,* 253 U. S. 339, 342.

States with power to make arrests. *Trupiano* v. *United States*, 334 U. S. 699, 705. They have, with respect to liquor offenses, the power to arrest without warrant when they have probable cause to believe that a felony has been committed.

Section 5313 (a) of 26 U. S. C. (Supp. IV) provides:

> The Secretary, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this part * * * which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

That section was said to be merely a continuation of existing law.* House Report No. 1337, 83d Cong., 2d Sess., 1954 U. S. Code Cong. and Adm. News, p. 4508;

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*Section 28 of the National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 316, had provided:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

After repeal, Section 9 of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872, 875, continued this power. Section 9, in turn, became Section 3121 (a) of the Internal Revenue Code of 1939 (26 U. S. C. (1946 ed.) 3121 (a)) and is presently 26 U. S. C. (Supp. IV) 5313 (a), quoted in the text, *supra*.

Senate Report No. 1622, 83d Cong., 2d Sess., 1954 U. S. Code Cong. and Adm. News, p. 5171. To ascertain the power of the Alcohol Tax Unit agents to arrest, one must look, therefore, to what authority Congress has elsewhere conferred upon law enforcement officials with respect to the liquor laws. The answer is found in 18 U. S. C. 3053, the only statute conferring powers to enforce the liquor laws, which authorizes United States Marshals to

> * * * make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Thus, by virtue of Section 5313 (a) of Title 26, *supra*, the power which United States Marshals have to arrest without warrant on probable cause for any felony is conferred, with respect to the liquor laws, upon agents of the Alcohol Tax Unit.'

'26 U. S. C. (Supp. IV) 7803 provides that the Secretary of the Treasury or his delegate may employ such persons as are necessary to enforce the internal revenue laws and issue such directions and orders to these persons as are necessary. By Treasury Decision 6091, 19 F. R. 5167, Aug. 16, 1954, regulations in force at the time of the enactment of the Internal Revenue Code of 1954 were continued in force.

By Treasury Department Order No. 150-2, 17 F. R. 4590, May 15, 1952, the Secretary delegated his powers with respect to the internal revenue laws to the Commissioner of Internal Revenue and authorized further delegation. By Commissioner's Reorganization Order No. 16, 18 F. R. 4033, July 1, 1953, the

Prior to the 1948 revision of the Criminal Code, former 18 U. S. C. (1940 ed.) 593, which was first enacted as Section 9 of the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, had provided:

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer * * *.

Although this section, relating specifically to the power to arrest for liquor offenses, was not continued by the 1948 revision of the Criminal Code,* since

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Commissioner delegated power to the Assistant Regional Commissioner, Alcohol and Tobacco Tax, to enforce all internal revenue laws relating to liquor, including authority to apprehend violators of such laws. By Commissioner Delegation Order No. 31, April 30, 1956, power to enforce the liquor laws was delegated to the Director, Alcohol and Tobacco Tax Division. This Order provided in pertinent part:

> "1. There is hereby delegated to the Assistant Commissioner, Operations, and the Director, Alcohol and Tobacco Tax Division, the authority—
>
> (a) to administer and enforce:
>
> (1) Chapters 51, 52 and 53 of the Internal Revenue Code relating, respectively, to distilled spirits, wines, and beer, tobacco, and firearms, including the authority to supervise and regulate the liquor and tobacco industries, * * *" .

Sections 7213.2 (2) and 7268 (1), Part VII, Enforcement, Alcohol and Tobacco Tax, Internal Revenue Manual, authorize enforcement personnel of the Alcohol and Tobacco Tax Division to arrest violators.

*See 62 Stat. 863; see, also, Notes of Advisory Committee on Rules, Rule 5 (a), Federal Rules of Criminal Procedure.

marshals had been given power since 1935 to arrest without warrant for all offenses,[9] agents of the Alcohol Tax Unit continue, under 26 U. S. C. (Supp. IV) 5313 (a), *supra,* to have the power of marshals as to liquor offenses.

The power of federal agents to arrest under federal law was recognized by this Court in a case arising before 1948. In *Brinegar* v. *United States,* 338 U. S. 160, the Court, without reference to state law,[10] upheld the power of agents without a warrant to stop and search a moving vehicle and arrest the driver. And, under the present statutes, the power which United States Marshals have generally, and which Alcohol Tax Unit agents therefore have as to liquor offenses, includes the power to arrest without a warrant on probable cause to believe that a felony has been committed.[11]

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[9] Section 2 of the Act of June 15, 1935, c. 259, 49 Stat. 377, 378 (now 18 U. S. C. 3053), *supra,* p. 12.

[10] This was after the Court had held in *United States* v. *Di Re,* 332 U. S. 581, that, where no federal law specified the right to arrest, state law would be controlling.

[11] Since there was not this background of statutory authority as to narcotics agents, their powers of arrest were not covered by federal law and were held to be governed by state law in *United States* v. *Di Re, supra.* Hence, a federal statute was deemed necessary to give them general powers to arrest without warrant irrespective of state law. 26 U. S. C. (Supp IV) 7607, added July 18, 1956.

Here, Georgia law provides (27 Code of Georgia, Sec. 207):

> An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.

Although it might be argued that the Alcohol Tax Unit

B. At the time of entry into the house, the agents had reasonable cause to believe that there were persons in the house then and there engaged in the commission of a felony and that petitioner was among them

Before the agents attempted to enter the house, they had ample cause to believe that there were persons inside who were subject to arrest and that petitioner was one of them. They had previously ascertained that the house was being used as a distillery. They had discovered spent mash discharging from a hose leading to petitioner's house. The next evening they knew the distillery was going full blast. They could hear the blower, which was fueling the boiler, in operation; an odor of cooking mash enveloped the area; spent mash was being discharged into the stream; voices and "bumping" noises could be heard; and people could be seen moving around the house (R. 29). Certainly, the agents knew then, if not before, that a number of people were involved in the operation.

On the following evening—that involved here—the events which the agents saw and heard gave them every reason to believe that a whole truck-load of illegally distilled liquor was then in the process of being removed from petitioner's home and that this represented the removal of the fruits of petitioner's operation. It was an event in which the operator of

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agents, having detected the odor of mash and heard the sound of the blower and of objects being moved, could arrest under state law for a felony committed in their presence (*Howell* v. *State*, 162 Ga. 14, 27, 30, 134 S. E. 59, 65, 66; *Ramsey* v. *State*, 92 Ga. 53, 63, 17 S. E. 613, 615), we believe that, for the reasons stated above, the federal agents' power to arrest is not limited by state law.

the still would have considerable interest. Accordingly, the agents had every reason to suppose that petitioner was on the premises at the time they acted to arrest the participants in the operation.

Having made two arrests outside the house, the agents still had petitioner to locate and arrest. A large quantity of liquor was on the truck and the agents could fairly believe that more than two persons had participated in loading it. It was also reasonable to conclude that the liquor had been in the house before loading. Lastly, it was reasonable to believe that petitioner was in the house since the agents had seen several people moving around inside the house before they first moved across the road. As it turned out, there were two people in the house besides the young boy—petitioner's father and brother—but the agents could not know their identity before entering and it was reasonable to suppose that one of these persons would be petitioner.[12]

It is perfectly clear that the agents knew they had reasonable cause to arrest petitioner if they could only find him. They had already arrested two participants in his enterprise outside his house. Agent Langford, who was in charge of the group, expressly testified that he assumed he had probable cause to

[12] It is this factor which distinguishes this case from *Johnson* v. *United States*, 333 U. S. 10. In that case, the narcotics agents did not know who was in defendant's room when they appeared at her door. Moreover, there might have been many persons inside and the defendant might not have been present, or implicated even if present. Here, the agents knew several persons had been in the house, and it was likely that petitioner, otherwise implicated, was one of them.

arrest anyone coming out of those premises who had violated an internal revenue law, *supra*, p. 6, and petitioner was clearly such a violator.

We believe that the conclusion that the agents entered the house to arrest petitioner is one which may rationally be drawn from the facts. After entering, the officers came across the illegal distillery while looking in all the rooms. But this search for petitioner was necessary because if he had been in the house at the time the investigators made the arrests outside the house, he would have been immediately aware that a raid was in progress, and might have sought to hide.[13] Having once ascertained that petitioner was not in the house, agent Langford returned to the front porch to await his return, rather than proceeding to seize the still. It was only after petitioner's return that the seizure took place. This evidenced an intent to arrest, rather than to search, at the time of entry.

The district judge's findings seem to support this interpretation. As we have previously noted, *supra*, p. 7, he expressly concluded (R. 55) that:

[13] Petitioner's wife testified that, in seeking to bar the agents' entry into the house, she had stated that petitioner was not at home and asked the agents to await his return (Pet. Brief, App. p. 19). However, the agents, who already had ample evidence, summarized above, that the persons at the house were engaged in illegal activities, were not obliged to accept without checking the statement that petitioner was not in the house—a representation which the agents might reasonably have believed was designed merely to secure delay and facilitate petitioner's escape. Cf. *Love* v. *United States*, 170 F. 2d 32, 33, certiorari denied, 336 U. S. 912, dismissed *infra*, p. 20.

> * * * the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime search warrant.

This we take to be a conclusion that the officers reasonably believed, on sufficient grounds, that petitioner was then and there engaged in committing a felony.

The law is clear that an officer having lawful authority to arrest without a warrant may do so even though he had previously had sufficient information and time to get a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 66. At the time of the adoption of the Constitution and ever since, except when the rule has been changed by statute, it has been established law, in England and in the federal and state courts, that a peace officer may arrest on reasonable cause to believe that a felony has been committed and that the person arrested has committed it. 2 Hale, *Pleas of the Crown* (1847), pp. 84–97; 4 Blackstone, *Commentaries* (1900), 290–295; 2 Hawkins, *Pleas of the Crown* (1787), pp. 128–130; Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 541, 673, particularly at 548–550 and 685–689; *Carroll* v. *United States,* 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt,* 115 U. S. 487, 504; *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281, 284–285; *Wakely* v. *Hart,* 6 Binn. (Pa.) 316, 318–319; *Samuel* v. *Payne,* 1 Dougl. 359; *Beckwith* v. *Philby,* 6 B. & C. 635. As Wilgus makes clear, *op. cit, supra,* the power to arrest without a warrant preceded the development of warrant pro-

cedure and was never supplanted by the warrant procedure.

In order to effect an arrest, an officer may enter and, where necessary, break into a house either pursuant to a valid warrant [14] or where he has probable cause to believe that a felony has been committed. See *e. g., Agnello* v. *United States,* 269 U. S. 20; *Mattus* v. *United States,* 11 F. 2d 503 (C. A. 9); *Appell* v. *United States,* 29 F. 2d 279 (C. A. 5); *Mullaney* v. *United States,* 82 F. 2d 638, 641 (C. A. 9); *United States* v. *Dean,* 50 F. 2d 905, 906 (D. Mass.); *United States* v. *Chin On,* 297 F. 2d 531, 533 (D. Mass.); *Commonwealth* v. *Phelps,* 209 Mass. 396; *Argetakis* v. *State,* 24 Ariz. 599, 606; *Shanley* v. *Wells,* 71 Ill. 78, 82; *McLennon* v. *Richardson,* 81 Mass. 74, 76; *Smith* v. *Tate,* 143 Tenn. 268, 275–276; 1 Wharton's Criminal Procedure (10th ed.) § 51; Wilgus, *Arrest Without a Warrant, supra,* 22 Mich. L. Rev. 541, 798, 800–807; see *Taylor* v. *United States,* 286 U. S. 1.

Furthermore, cases such as this, where no arrest is made after entry, stand on the same footing so long as the agents had probable cause to make an arrest and had reason to believe, and did believe, that the suspected individual was in the house. The entry is nonetheless authorized and legal. *Love* v.

[14] See, *e. g., United States* v. *Faw,* Fed. Cas. No. 15,079; *Kelsy* v. *Wright,* 1 Root 83 (Conn., 1783); *State* v. *Shaw,* 1 Root 134 (Conn., 1789); *Hawkins* v. *Commonwealth,* 53 Ky. 395; *Barnard* v. *Bartlett,* 64 Mass. (10 Cush.) 501; *Commonwealth* v. *Irwin,* 83 Mass. (Allen) 587; *Commonwealth* v. *Reynolds,* 120 Mass. 190; *State* v. *Mooring,* 115 N. C. 709; *State* v. *Shook,* 224 N. C. 728, 733–734; *State* v. *Smith,* 1 N. H. 346; and cases collected in 5 A. L. R. 263.

United States, 170 F. 2d 32, 33 (C. A. 4), certiorari denied, 336 U. S. 912; *Paper* v. *United States,* 53 F. 2d 184, 185 (C. A. 4); *Lane* v. *United States* 148 F. 2d 816 (C. A. 5), certiorari denied, 326 U. S. 720; *Martin* v. *United States,* 183 F. 2d 439 (C. A. 4), certiorari denied, 340 U. S. 904.

In *Love* v. *United States,* 170 F. 2d 32, 33 (C. A. 4), *supra,* the agents had a warrant for the arrest of Foster and information that he was at defendant's house. Defendant denied that Foster was there but the agents entered to look for him. While inside they found a distillery in operation. The court held that the motion to suppress was properly denied for "[t]he officers were rightfully in the house * * * [citation omitted] and the discovery of the unlawful still was incidental to lawful search for Foster". And in *Paper* v. *United States,* 53 F. 2d 184, 185 (C. A. 4), *supra,* evidence was held to be admissible where officers entered the defendant's premises for the purpose of finding and arresting him and while lawfully there discovered that a crime was being committed in their presence. Similarly, see *Martin* v. *United States,* 183 F. 2d 436, 439 (C. A. 4), *supra,* where the search was upheld, the court saying, "[i]n other words, the legality of the search under these peculiar circumstances cannot be distinguished on any reasonable basis from the search of the premises of an accused as an incident to the lawful arrest of his person; * * *."

We have no quarrel with the holdings in such cases as *Accarino* v. *United States,* 179 F. 2d 456, 463 (C. A. D. C.), or *McKnight* v. *United States,* 183 F. 2d

977 (C. A. D. C.), where there was ample opportunity to arrest the defendant outside the home. Nor do we question cases such as *Gibson* v. *United States*, 149 F. 2d 381, 383 (C. A. D. C.); certiorari denied *sub nom. O'Kelly* v. *United States*, 326 U. S. 724, *Gatewood* v. *United States*, 209 F. 2d 789, 790 (C. A. D. C.), and *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 693 (C. A. D. C.), where there was no probable cause to enter to make, or attempt to make, an arrest. We agree that there must always exist probable cause to arrest and probable cause to believe that the person sought is inside the house. But it does not follow from these cases that, where an immediate arrest is justified or compelled, and there is good cause to believe that the person sought is inside, the home may nevertheless not be entered. The numerous cases cited above (*supra*, pp. 19–20) show that, where there is good reason to believe that a felony is being or has just been committed by a person who either committed it in the house or is probably hiding there, the officers may properly enter the house, over protest if necessary,[15] to make, or attempt to make, an arrest; their entry is not rendered unlawful by reason of the unanticipated fact that the person whom they were seeking did not happen to be there at the time.

[15] Petitioner concedes that "the methods used by the officers [to gain entry] are not technically a legal ground for the suppression of the evidence". Pet. Brief p. 6, footnote. Cf. *Batrientes* v. *United States*, 235 F. 2d 116 (C. A. 5), certiorari denied, 352 U. S. 879; *People* v. *Maddox*, 46 Cal. 2d 301, certiorari denied, 352 U. S. 858.

C. Since the entry was lawful, the seizure of contraband open to view during the search for petitioner was also lawful

Since, as we have shown, the entry was lawful, it follows under the statute [16] that the officers had the right to seize or destroy articles open to their view, found while probing for petitioner's hiding place, which were contraband and in which petitioner could have no property right whatsoever.[17]

In this type of situation, where the property seized is clearly contraband and is open to view at the time it is found, the right of the officers to seize does not depend upon the making of a contemporaneous arrest or upon the possession of a valid search warrant. The right to seize arises from the fact that, in a place which they have lawfully entered, the agents see before them property the very possession of which is a crime. Time and again, Congress has declared, both specifically and generally, that the type of property found in petitioner's home cannot lawfully be possessed.[18] Moreover, experienced agents would have

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[16] 26 U. S. C. (Supp. IV) 7321 (any property subject to forfeiture to the United States may be seized by the Secretary or his delegate); 26 U. S. C. (Supp. IV) 5623 (seizing officer may destroy any still or still equipment which it is impracticable to remove); 26 U. S. C. (Supp. IV) 7301 (any property or equipment subject to tax or used to make property subject to tax which is held for the purpose of evading the payment of tax or in fraud of the internal revenue laws is subject to forfeiture and seizure); 26 U. S. C. (Supp. IV) 5691 (any distillery and all its appurtenances on which the special tax is not paid shall be forfeited to the United States).

[17] See 26 U. S. C. (Supp. IV) 7302 (no property rights shall exist in any property intended for use in violating the internal revenue laws).

[18] For the predecessor statutes to those cited above in footnote 16, see 26 U. S. C. (1940 ed.) 2810, 2814, 2833, 3116.

no difficulty in ascertaining at a glance that petitioner's distillery was properly forfeit under the internal revenue laws. The still was found in a house, and by statute these premises could never lawfully be used as the site of a distillery. 26 U. S. C. (Supp. IV) 5171. The building obviously carried no sign reading "registered distillery" as required by 26 U. S. C. (Supp. IV) 5180. Thus, when the agents came into the house seeking to arrest petitioner—a lawful entry—they found before them apparatus which by law was forfeit to the United States, equipment which petitioner did not and could not own.

Duty demanded that the agents take possession of that property. This Court has always recognized that where, in the course of his official duties, an officer has come upon property which is contraband or the instrumentality of a crime, the officer need not close his eyes to it, but can seize the property without a warrant. *Harris* v. *United States*, 331 U. S. 145; *Zap* v. *United States*, 328 U. S. 624; *Steele* v. *United States No. 1*, 267 U. S. 498; see *Adams* v. *New York*, 192 U. S. 585, 598; *Carroll* v. *United States*, 267 U. S. 132, 158. On principle, when measuring whether or not such a seizure is proper, it is not essential that the officer be shown to have come upon the offending property in any particular way—so long as his activity is lawful. He may have come upon the property subject to seizure as part of a lawful search incident to arrest for another crime as in *Harris;* during inspection of corporate books open to government agents by contract as in *Zap;* or while executing a warrant for other property as in *Steele*. It is only necessary, as in this case, that the officers lawfully

come upon the scene where the property subject to seizure is found.[19]

In sum, where entry is lawfully made for some other purpose, and thereafter contraband property is found in open view, it is subject to immediate seizure. That is this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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[19] Lower courts have consistently followed the same rule. *Ellison* v. *United States*, 206 F. 2d 476 (C. A. D. C.) (stolen goods seen on defendant's property by officers who were legally on defendant's front porch); *Kelly* v. *United States*, 197 F. 2d 162 (C. A. 5) (a customs official searching for aliens illegally entering the country found non-tax paid liquor); *Love* v. *United States*, *supra*, 170 F. 2d 32, certiorari denied, 336 U. S. 912 (distillery found in defendant's home by officers seeking to arrest one Foster, who was believed to be hiding therein); *Lane* v. *United States*, *supra*, 148 F. 2d 816 (C. A. 5), certiorari denied, 326 U. S. 720 (officers searching for defendant to arrest him found articles used to make non-tax paid liquor in defendant's garage); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 570–571 (C. A. 9), certiorari denied, 325 U. S. 877 (sales at illegal prices found while inspecting books required by law to be kept); *Bowles* v. *Ray*, 146 F. 2d 652 (C. A. 9), certiorari denied, 325 U. S. 875 (same); *Bennett* v. *United States*, 145 F. 2d 270 (C. A. 4), certiorari denied, 323 U. S. 788 (search warrant for counterfeiting apparatus justified seizure of counterfeit ration coupons).

APPENDIX

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Act of March 1, 1879, c. 125, Sec. 9, 20 Stat. 327, 341–342 (18 U. S. C. (1940 ed.) 593, repealed, 62 Stat. 863) provided:

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes.

The National Prohibition Act of October 28, 1919, c. 85, Title II, Sec. 28, 41 Stat. 316, provided:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

The Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, Sec. 9, 49 Stat. 875, provided:

> The Commissioner, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this title and of Title III of the National Prohibition Act, which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

18 U. S. C. 3053 provides:

> United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

The pertinent provisions of the Internal Revenue Code (26 U. S. C. (Supp. IV)) are:

§ 5313. *Powers and duties of persons enforcing this part.*

(a) *Secretary and other persons.*

The Secretary, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this part or section 5686 which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

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§ 5623. *Destruction of distilling apparatus.*

When a judgment of forfeiture, in any case of seizure, is recovered against any distillery used or fit for use in the production of distilled spirits, because no bond has been given, or against any distillery used or fit for use in the production of spirits, having a registered producing capacity of less than 150 gallons a day, for any violation of law, of whatever nature, every still, doubler, worm, worm tub, mash tub, and fermenting tub therein shall be so destroyed as to prevent the use of the same or of any part thereof for the purpose of distilling; and the materials shall be sold as in case of other forfeited property. In case of seizure of a still, doubler, worm, worm tub, mash tub, fermenting tub, or other distilling apparatus, for any offense involving forfeiture of the same, where it shall be impracticable to remove

the same to a place of safe storage from the place where seized, the seizing officer is authorized to destroy the same only so far as to prevent the use thereof, or any part thereof, for the purpose of distilling (except in the case of a registered distillery). Such destruction shall be in the presence of at least one credible witness, and such witness shall unite with the said officer in a duly sworn report of said seizure and destruction, to be made to the Secretary or his delegate, in which report they shall set forth the grounds of the claim of forfeiture, the reasons for such seizure and destruction, their estimate of the fair cash value of the apparatus destroyed, and also of the materials remaining after such destruction, and a statement that, from facts within their own knowledge, they have no doubt whatever that said distilling apparatus was set up for use for distillation, redistillation or recovery of distilled spirits and not registered, or had been used in the unlawful distillation of spirits, and that it was impracticable to remove the same to a place of safe storage. Within 1 year after such destruction the owner of the apparatus so destroyed may make application to the Secretary or his delegate for reimbursement of the value of the same; and, unless it shall be made to appear to the satisfaction of the Secretary or his delegate that said apparatus had been used in the unlawful distillation of spirits, the Secretary or his delegate shall make an allowance to said owner, not exceeding the value of said apparatus, less the value of said materials as estimated in said report; and if the claimant shall there-

upon satisfy the Secretary or his delegate that said unlawful use of the apparatus had been without his consent or knowledge, he shall still be entitled to such compensation, but not otherwise. In case of a wrongful seizure and destruction of property under this section, the owner thereof shall have right of action on the official bond of the officer who occasioned the destruction for all damages caused thereby.

§ 5691. *Penalties and forfeitures for nonpayment of special taxes relating to liquors.*

Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in beer, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not more than $5,000, and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States.

§ 7301. *Property subject to tax.*

(a) *Taxable articles.*

Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the

purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.

(b) *Raw materials.*

All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax, may also be seized and shall be forfeited to the United States.

(c) *Equipment.*

All property whatsoever, in the place or building, or any yard or enclosure, where the property described in subsection (a) or (b) is found, or which is intended to be used in the making of property described in subsection (a), with intent to defraud the United States of tax or any part thereof, on the property described in subsection (a) may also be seized, and shall be forfeited to the United States.

(d) *Packages.*

All property used as a container for, or which shall have contained, property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.

(e) *Conveyances.*

Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or

for the deposit or concealment of property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.

§ 7302. *Property used in violation of internal revenue laws.*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or these hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

§ 7321. *Authority to seize property subject to forfeiture.*

Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary or his delegate.

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